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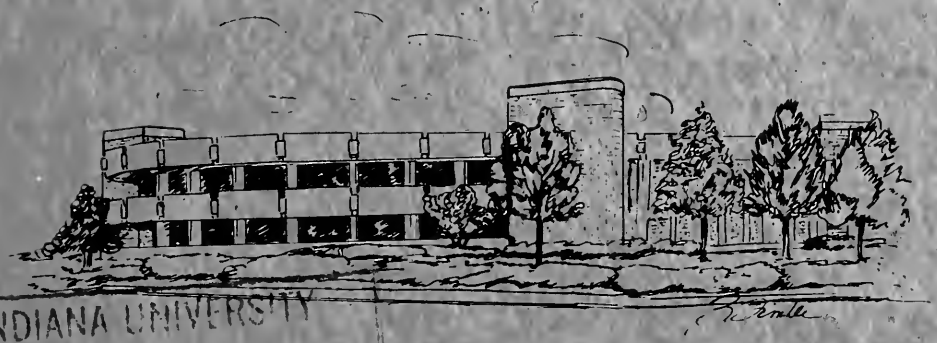

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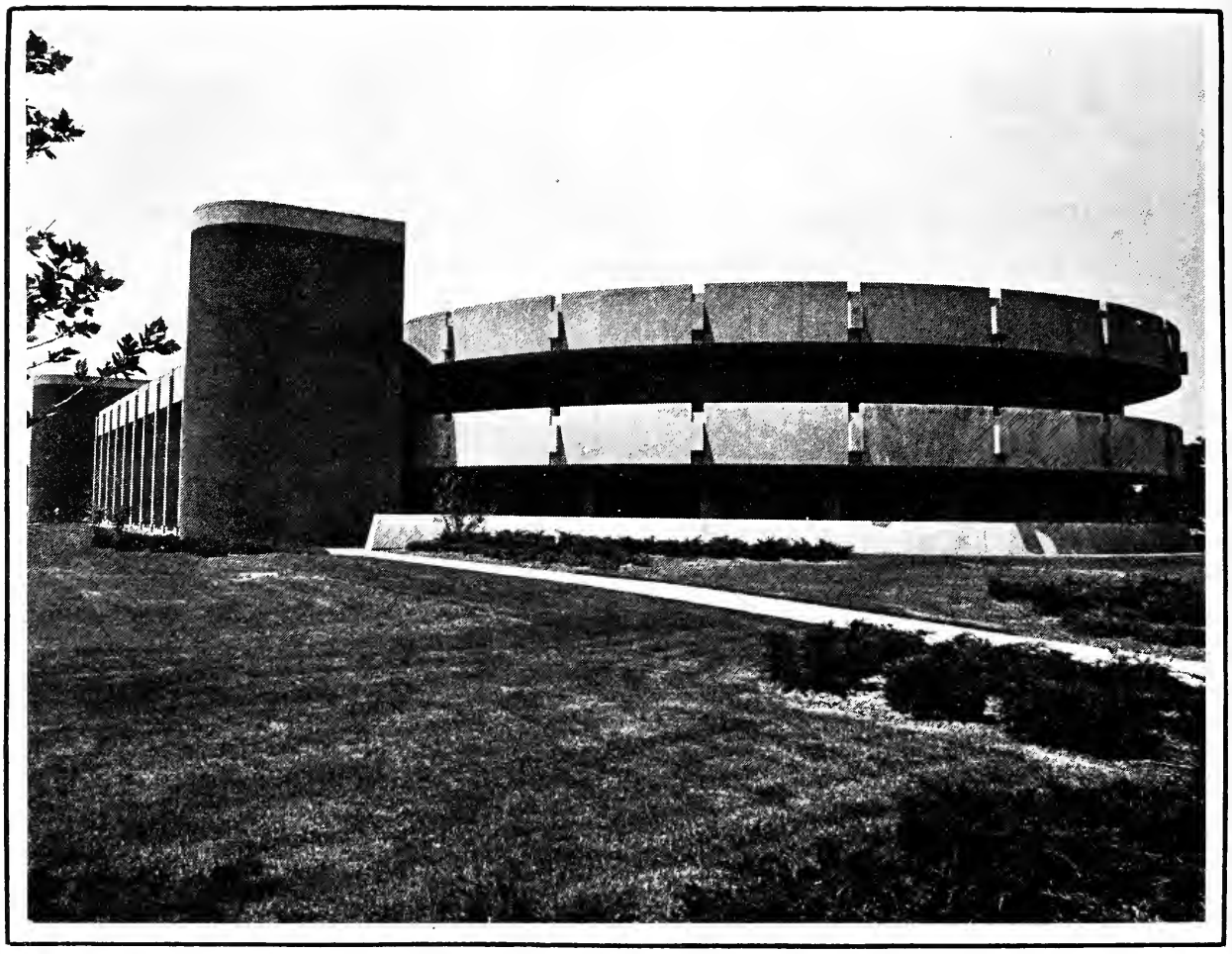

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Constitutional Considerations of State Taxation of Multinational Corporate Income: Before and After *Container Corporation of America v. Franchise Tax Board*

WILLIAM W. STUART*
MICHAEL K. WILLIAMS**

I. INTRODUCTION

Domestic law has been applied to the multinational corporation through operation of the federal securities laws, the federal antitrust laws, and the federal tax laws.[1] Over the last two decades much critical commentary has been directed to identifying the extent to which the national tax laws apply to multinational corporations.[2] More recently consideration has been given to whether state governments can include foreign-source income in determining taxable corporate income.[3] The crux of the question is whether the states should be limited in taxing such income, which primarily consists of dividends, interest, and capital gains derived from foreign subsidiaries and affiliates.[4]

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[1]*See generally*, C. BERGSTEN, T. HORST & T. MORAN, AMERICAN MULTINATIONALS AND AMERICAN INTERESTS (1978); R. TINDALL, MULTINATIONAL ENTERPRISES: LEGAL AND MANAGEMENT STRUCTURES AND INTERRELATIONSHIP WITH OWNERSHIP, CONTROL, ANTITRUST, LABOR, TAXATION AND DISCLOSURE (1975).

[2]*See generally*, L. KRAUSE & K. DAM, FEDERAL TAX TREATMENT OF FOREIGN INCOME (1964).

[3]*See* GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, HOUSE COMMITTEE ON WAYS AND MEANS: KEY ISSUES AFFECTING STATE TAXATION OF MULTIJURISDICTIONAL CORPORATE INCOME NEED RESOLVING (1982) (GA1.13 GGD-82-38) [hereinafter cited as G.A.O. REPORT-1982]. The General Accounting Office, in a long-anticipated report, concluded that congressional action is required to resolve controversies and complexities in the State taxation of multijurisdictional corporations. For purposes of this article, a multijurisdictional corporation may be defined as a corporation or a group of related corporations operating in several states or of diverse nationality joined together by common ownership and management. The taxation of international investments has become important in recent years because of the growth in the international economy.

[4]For purposes of this article, a foreign subsidiary or affiliate is a non-United States corporation in which a corporation based in the United States has a substantial

In *ASARCO Inc. v. Idaho State Tax Commission*[5] and *F. W. Woolworth Co. v. Taxation & Revenue Department*,[6] the United States Supreme Court severely restricted the ability of the states to tax a domestic parent corporation on foreign-source income on the grounds that due process considerations prevented state taxation of subsidiaries which did not have a unitary business relationship with the parent corporation. Although consistent with the reasoning of *ASARCO* and *Woolworth*, the Supreme Court recently endorsed the state taxation of the worldwide combined income generated by a domestic parent corporation and its foreign subsidiaries which were found to constitute a unitary business in *Container Corp. of America v. Franchise Tax Board*.[7]

The purpose of this article is to examine the due process considerations with regard to the state taxation of corporate foreign-source income as developed by the Supreme Court, and to analyze the Court's commitment to the unitary business concept. First, the constitutional and statutory principles underlying current methods of state taxation of multijurisdictional corporations need to be identified. Secondly, the historical development of the unitary business principle will be discussed along with an overview of recent legislative activity and judicial decisions in this area. Finally, an examination will be made of recent United States Supreme Court decisions recognizing constitutional considerations regarding the state taxation of the income of multinational corporations based in the United States.

Attention will be directed at *Mobil Oil Corp. v. Commissioner of Taxes*,[8] in which the Supreme Court held that it is permissible for a state to include foreign-source dividends in taxable income, assuming there is a unitary relationship between the payor foreign corporation and the recipient domestic corporation. The analysis developed in the *Mobil* decision provides the foundation for the Court's subsequent decisions placing limits on state taxation of foreign-source income. An examination of the factual situations and constitutional principles contained in *ASARCO* and *Woolworth* reveals that there continues to be a number of unresolved issues related to the power of the states to tax foreign-source income. *Container* seems to be the

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ownership interest. Unlike a multistate corporation which conducts business within a domestic context, a multinational corporation has the capacity to create markets for its products and services on a global scale in an international context. For a report on the growth of multinational corporations, see GENERAL ACCOUNTING OFFICE, REPORT TO THE CHAIRMAN, HOUSE COMMITTEE ON WAYS AND MEANS: IRS COULD BETTER PROTECT U.S. TAX INTERESTS IN DETERMINING THE INCOME OF MULTINATIONAL CORPORATIONS 4 (1981) (GA1.13 GGD-81-81) [hereinafter cited as G.A.O. REPORT-IRS].

[5]102 S. Ct. 3103 (1982).

[6]102 S. Ct. 3128 (1982).

[7]103 S. Ct. 2933 (1983).

[8]445 U.S. 425 (1980).

Court's valedictory opinion on these due process matters for the decision serves to defer the further resolution of these issues to the judgment of the state courts.

II. The Sources of the Constitutional Limitations

The states have the general power to tax the income of corporations.[9] The United States Constitution, however, imposes several restrictions on the states' taxing power.[10] Among these,[11] the most significant restrictions are imposed by the commerce clause[12] and the due process clause.[13]

A. Commerce Clause Limitations

The commerce clause restrains a state from promoting taxation which discriminates against interstate commerce[14] by providing a direct commercial advantage to local business,[15] or which places an undue burden of multiple taxation[16] on interstate commerce.[17] Under the four-pronged standard announced by the Supreme Court in *Complete Auto Transit, Inc. v. Brady*,[18] a tax will pass review under the

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[9]As of December 31, 1981, 44 states and the District of Columbia had some type of corporate income tax. *See* 1 [All States Unit] St. & Loc. Tax Serv. (P-H) ¶ 101; *see also* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278-80 (1978); Corrigan & Dexter, *States' Latitude in Taxing Multistate Businesses*, 11 Urb. Law. 505 (1979).

[10]*See* P. Hartman, Federal Limitations on State and Local Taxation 6 (1981).

[11]The equal protection clause of the fourteenth amendment is such a restriction which provides, in pertinent part, that no state shall "deny to any person within its jurisdiction the equal protection of the Laws." U.S. Const. amend. XIV, § 1. *See* Western & S. Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981) (upholding the constitutionality of retaliatory state tax imposed upon foreign insurance companies); Note, *Taxing Out-of-State Corporations After* Western & Southern: *An Equal Protection Analysis*, 34 Stan. L. Rev. 877 (1982).

[12]U.S. Const. art. I, § 8: "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[13]U.S. Const. amend. XIV, § 1: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[14]State taxes that "discriminate against interstate commerce" are strictly scrutinized under the commerce clause. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279, 288-89 n.15 (1977); *see also* Memphis Steam Laundry Cleaner, Inc. v. Stone, 342 U.S. 389, 394-95 (1952); Nippert v. City of Richmond, 327 U.S. 416 (1946).

[15]*See* Maryland v. Louisiana, 451 U.S. 725 (1981); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318 (1977).

[16]Multiple taxation is the taxation of the same income by more than one taxing jurisdiction. *See* Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 442-46 (1980).

[17]For general discussions with regard to commerce clause restrictions on the power of states to tax, see Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 Vand. L. Rev. 335 (1976); Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?*, 75 Mich. L. Rev. 1426 (1977); Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 Wis. L. Rev. 125.

[18]430 U.S. 274 (1977).

commerce clause so long as the tax "[1] is applied to an [interstate] activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to services provided by the State."[19] When the instrumentalities of foreign commerce are involved, however, the state tax may be unconstitutional under the commerce clause if it violates either of two standards articulated in *Japan Line, Ltd. v. County of Los Angeles*,[20] namely, if the tax (1) creates a substantial risk of multiple taxation at the international level, or (2) interferes with the federal regulation of foreign commercial relations.[21]

B. Due Process Clause Limitations

It is a well established principle of constitutional law that the due process clause precludes a state from taxing value earned outside of its borders.[22] When imposing a tax which is geared to income, the

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[19]*Id.* at 279. *See also* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) (focusing on the "fair relation" prong of the *Complete Auto Transit* test which is satisfied if the measure of the tax is reasonably related to the extent of the taxpayer's contact with the taxing state).

[20]441 U.S. 434 (1979).

[21]*Id.* at 450-51. *But see* Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 446 (1980).

In *Japan Line*, the Court considered whether a property tax was unconstitutional if the tax was assessed against shipping containers owned and registered in another nation and used exclusively in foreign commerce. The Court explained why some multiple taxation may be acceptable with respect to the state taxation of interstate commerce, but not acceptable with respect to the state taxation of foreign commerce.

> Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state tax, even though "fairly apportioned" to reflect an instrumentality's presence within the State, may subject foreign commerce "'to the risk of a double tax burden to which [domestic] commerce is not exposed, and which the commerce clause forbids.'"

441 U.S. at 447-48 (quoting Evco v. Jones, 409 U.S. 91, 94 (1972) (quoting J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 311 (1938))). The Court analyzed the potentially harmful effect that such a state tax may have on foreign commerce:

> A state tax on instrumentalities of foreign commerce may frustrate the achievement of federal uniformity in several ways. If the State imposes an apportioned tax, international disputes over reconciling apportionment formulae may arise. If a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate against American-owned instrumentalities present in their jurisdictions. Such retaliation of necessity would be directed at American transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer. If other States followed the taxing State's example, various instrumentalities of commerce could be subjected to varying degrees of multiple taxation, a result that would plainly prevent this Nation from "speaking with one voice" in regulating foreign commerce.

441 U.S. at 450-51.

[22]*See* ASARCO, Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103, 3109 (1982).

taxing power asserted by a state must bear a fair and substantial financial relationship to the protections, opportunities, and benefits conferred by that state. In these instances the controlling question is whether the taxing state has given anything to the corporation for which it can ask a return.[23] In *Moorman Manufacturing Co. v. Bair*,[24] the Court refined this question by combining prior decisions into the following test:[25] (1) a minimal connection must exist between the corporation's activities and the taxing state,[26] and (2) there must be a rational relationship between the income attributed to the state for taxing purposes and the values connected with the state.[27]

III. Principles and Methods of State Taxation of Income of Multinational Corporations

In complying with the constitutional limitations, the states have developed certain methods and adopted certain principles with regard to the taxation of corporate net income. These principles and methods are related to the composition of taxable income, a state's jurisdiction to tax, and the division of such net income among the taxing jurisdictions. Because most of these concepts may be applicable to multinational corporations as well as to multistate corporations, it is appropriate to briefly review them.

A. Composition of the Tax Base: Determining Taxable Income

The majority of the states make reference to the federal taxable income of a multinational corporation for the initial determination of the composition of the income taxable by the state.[28] Those states, however, make certain adjustments to federal taxable income in order to later determine what portion of a multinational corporation's income they can tax. With respect to such adjustments, an important issue is whether and to what extent intercorporate dividends are to

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[23]Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

[24]437 U.S. 267 (1978).

[25]*Id.* at 272-73.

[26]The Court has stated that this is the "time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax." Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954). The nexus is established if a corporation avails itself of the "substantial privilege of carrying on business" within the taxing state. Wisconsin v. J.C. Penney, 311 U.S. 435, 444-45 (1940).

[27]Butler Bros. v. McColgan, 315 U.S. 501, 506 (1942).

[28]For a discussion of this method and a listing of the states using it, see G.A.O. Report-1982, *supra* note 3, at 13, 60-61. The remaining states which tax corporate net income generally start with the gross income of the multijurisdictional corporation and deduct certain items. L. Hale & R. Kramer, State Tax Liability and Compliance Manual 28-29 (1981) [hereinafter cited as Hale & Kramer].

be included in the taxable income.[29] Similar issues arise with respect to other types and forms of income, such as interest and royalties[30] or capital gains from the sale of assets in a state other than the taxing state.[31] These issues are often resolved by focusing on an even more fundamental analysis—whether the taxing state has the appropriate jurisdiction to tax the income.

B. Jurisdiction to Tax

The states use various criteria to establish jurisdiction to tax;[32] however, the appropriate criteria will vary depending on the type of tax.[33] With respect to net income taxes, two of the most significant concepts are commercial domicile[34] and nexus.[35] States have the power to tax their domiciliaries on income earned in other states.[36] In *Memphis Natural Gas Co. v. Beeler*,[37] the Court upheld a tax on the net

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[29]The federal tax system permits corporations within a controlled group to deduct 85% to 100% of the dividends received from other corporations to the extent that the dividends received represent income that has already been subject to federal income taxation in order to avoid multiple taxation of the income prior to the distribution of the income to shareholders. *See* I.R.C. §§ 243-247 (West 1978 & West Supp. 1983), § 882 (West 1982 & West Supp. 1983); B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATIONS AND SHAREHOLDERS ¶ 5.06 (4th ed. 1979). In the case of an affiliated group of corporations which files a consolidated return under I.R.C. sections 1501-1505, dividends paid by one member of the affiliated group to another member of the affiliated group are eliminated from taxable income. *See* Treas. Reg. § 1.1502-14(a)(1) (1972). Dividend income, however, is generally subject to state tax even though it may be deductible for federal income tax purposes. The majority of the states do not acknowledge these deductions. *See* HALE & KRAMER, *supra* note 28, at 45.

[30]*See, e.g.*, Qualls v. Montgomery Ward & Co., 266 Ark. 207, 585 S.W.2d 18 (1979) (interest).

[31]*See, e.g.*, Atlantic Richfield Co. v. State, 198 Colo. 413, 601 P.2d 628 (1979).

[32]For a general listing of the various jurisdiction to tax criteria which are used by the states which tax multijurisdictional corporations, see G.A.O. REPORT-1982, *supra* note 3, at 59-60. States tax corporations: (1) doing business in the state; (2) deriving income from sources or activities in the state; (3) owning, leasing, or deriving income from property in the state; (4) or maintaining an office in the state. *Id.*

[33]*See, e.g.*, Standard Pressed Steel Co. v. Washington, 419 U.S. 560 (1975) (presence of agents in the state is sufficient contact to justify imposition of sales or gross receipts taxes); National Geographic Soc'y v. Franchise Tax Bd., 430 U.S. 551 (1977) (any type of permanent office or employees imposes duty to collect use taxes on sales).

[34]"Commercial domicile" is the state in which the operations and activities of a corporation are managed. Wheeling Steel Corp. v. Fox, 298 U.S. 193, 211-12 (1936); *see also Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953, 1005 (1962) (courts have relied on *Wheeling Steel* to sustain net income taxes on the basis of commercial domicile).

[35]*See supra* note 26 and accompanying text.

[36]New York *ex rel.* Cohn v. Graves, 300 U.S. 308 (1937) (rent from out-of-state land); Lawrence v. State Tax Comm'r, 286 U.S. 276 (1932) (compensation for personal services rendered outside taxing state).

[37]315 U.S. 649 (1942).

income of a foreign corporation over commerce clause objections on the ground that the corporation's establishment of a commercial domicile in the state provided the necessary jurisdiction to tax.[38]

The due process clause requires sufficient activities or connections between the corporation and the taxing state to provide the state with the jurisdiction to tax.[39] In the past, the Supreme Court has not imposed a very demanding test for determining what minimum connections are necessary to satisfy the due process requirement. In *Northwestern States Portland Cement Co. v. Minnesota*,[40] the Court sustained the power of a state to levy a net income tax on an out-of-state corporation doing an exclusively interstate business in the state.[41] The Court concluded that the states could tax the entire net income of a multijurisdictional corporation generated by interstate as well as intrastate activities provided that the income was fairly divided among the taxing states and that the tax was not discriminatory.[42] Shortly thereafter, Congress enacted legislation on the states' jurisdiction to tax.[43]

C. Division of Income Among Jurisdictions

In general, the due process clause provides that a state may only tax net income arising from sources within the state.[44] Because a state may not tax value earned outside of its borders, the states have devised three methods to determine the portion of a multijurisdictional corporation's income which is deemed to be earned within their borders: separate accounting, specific allocation, and formulary apportionment.[45]

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[38]*Id.* at 652, 656-67.

[39]*See supra* notes 22-27 and accompanying text.

[40]358 U.S. 450 (1959).

[41]The systematic sales solicitation activities in the state subjected the corporation to the state net income tax even though all orders taken were subject to the final approval of out-of-state offices. *Id.* at 454.

[42]*Id.* at 452.

[43]Act of Sept. 14, 1959, Pub. L. No. 86-272, tit. I, §§ 101-104, 73 Stat. 555-56 (codified at 15 U.S.C. §§ 381-384 (1976)). Even though this law placed restrictions on a state's jurisdiction to tax, it is of little importance to the multijurisdictional corporation because its scope includes only small merchandising businesses. *See* Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335, 339 (1976). For an analysis of Pub. L. No. 86-272 and a treatment of the case law thereunder, see Hartman, *"Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course*, 29 VAND. L. REV. 353 (1976); *Developments in the Law—Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953 (1962).

[44]*See* Rudolph, *State Taxation of Interstate Business: The Unitary Business Concept and Affiliated Corporate Groups*, 25 TAX L. REV. 171, 181 (1970) (cited in *ASARCO*, 102 S. Ct. at 3109 n.11); *see also Northwestern States Portland Cement Co.*, 358 U.S. at 464.

[45]*See* Dexter, *The Unitary Concept in State Income Taxation of Multistate-Multinational Businesses*, 10 URB. LAW. 181, 181 (1978); H.R. REP. NO. 1480, 88th Cong.,

Separate accounting is used when a corporation can separate with accuracy the net income, if any, generated or derived within a particular state from income generated or derived within other states or geographic areas. Specific allocation involves determining the source of particular items of income, such as interest, dividends, and capital gains, which the states may allocate to the commercial domicile of the corporation. Specific allocation is sometimes used in conjunction with formulary apportionment.

In contrast to this formal geographical or transactional accounting, formulary apportionment does not trace the source of the income or assign income-generating activities to certain states; rather, the formulary apportionment method divides the income of a corporation in accordance with a mathematical formula which quantifies income-generating factors and roughly approximates the income connected with the taxing state.[46] The Court has given the states wide latitude in selecting apportionment formulas and has said that it will not invalidate an assessment resulting from such a formula unless a corporation proves "'by clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions'" to the income-generating activities in that state or is a gross distortion.[47]

D. Legislative Development and Statutory Application

All states which have a corporate income tax use formulary apportionment.[48] The mathematical formula attributes the total income of a multijurisdictional corporation to the states on the basis of certain income-generating factors. The three factors most generally used in the apportionment formula are property, payroll, and sales.[49] Most of the taxing states have statutes which apportion income by comparing the average of the three factors of the formula within the taxing state to the total of such factors both within and without the

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2d Sess. 160-217 (1964) [hereinafter cited as Special Subcommittee Report]; G. ALTMAN & F. KEESLING, ALLOCATION OF INCOME IN STATE TAXATION 67-168 (1950); HALE & KRAMER, *supra* note 28, at 30-36; J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION 432-37 (4th ed. 1978) (separate accounting) [hereinafter cited as STATE AND LOCAL TAXATION]; Boren, *Specific Allocation of Corporate Income in California: Some Problems in the Uniform Division of Income for Tax Purposes*, 30 TAX. L. REV. 607 (1975) (specific allocation); Hartman, *State Taxation of Corporate Income from a Multistate Business*, 13 VAND. L. REV. 21, 64-74 (1959) (formula apportionment).

[46]*See* Moorman Mfg. Co. v. W. Bair, 437 U.S. 267, 273 (1978).

[47]*Id.* at 274 (quoting Hans Rees' Sons, Inc. v. North Carolina *ex rel.* Maxwell, 283 U.S. 123, 135 (1931)). The burden of proving that a state tax is unconstitutional traditionally has been on the taxpayer. Dexter, *supra* note 45, at 187.

[48]*See* Dexter, *supra* note 45, at 182 & n.1.

[49]*See* General Motors Corp. v. District of Columbia, 380 U.S. 553, 559 (1965); Special Subcommittee Report, *supra* note 45, at 168-70 (providing a description of formula apportionment and illustrations of the mechanics of the use of different formulas).

state.[50] There have been two significant state statutory developments addressing the problem of dividing the income of a multijurisdictional corporation among those states having the jurisdiction to tax some portion of that income: (1) the Uniform Division of Income for Tax Purposes Act (UDITPA)[51] and (2) the Multistate Tax Compact (Compact).[52]

The UDITPA sets forth principles of allocation and apportionment of the income of a multijurisdictional corporation which are designed to ensure that the states avoid both multiple taxation and under taxation.[53] These principles split corporate income into business income and non-business income.[54] Business income arises from transactions and activities in the regular course of business.[55] Non-business income is all income other than business income.[56] Items of non-business income, such as dividends, interest, and capital gains, are allocated to the particular state according to the principles set out in the UDITPA,[57] which usually permit a tax to be imposed where the corporation is commercially domiciled.[58] Business income is apportioned on the basis of an equally weighted three-factor formula[59] which includes property, payroll, and sales.[60]

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[50]The three-factor formula is:

$$\frac{\frac{\text{In-State property}}{\text{Total property}} + \frac{\text{In-State payroll}}{\text{Total payroll}} + \frac{\text{In-State sales}}{\text{Total sales}}}{3} \times \text{Total corporate income} = \text{Income taxable by the State}$$

See 1 [All States Unit] ST. & LOC. TAX SERV. (P-H) ¶ 1046; Special Subcommittee Report, *supra* note 45, at 170.

[51]UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT, 7A U.L.A. 91 (1957) [hereinafter cited as UDITPA]. The UDITPA is also reproduced as Article IV of the Multistate Tax Compact [hereinafter cited as Compact] in 1 [All States Unit] ST. & LOC. TAX SERV. (P-H) ¶¶ 6315-6332. For a list of the states which have adopted substantially all of the UDITPA to date, see 7A U.L.A. 11 (Supp. 1983).

[52]For the text of the Compact, see 1 [All States Unit] ST. & LOC. TAX SERV. (P-H) ¶ 6310. For a list of the Compact members and associate members, see *id.* ¶ 5150.

[53]*See generally* Lynn, *Formula Apportionment of Corporate Income for State Tax Purposes: Natura Non Facit Saltum,* 18 OHIO ST. L.J. 84 (1957); Lynn, *The Uniform Division of Income for Tax Purposes Act*, 19 OHIO ST. L.J. 41 (1958); Pierce, *The Uniform Division of Income for State Tax Purposes*, 35 TAXES 747 (1957) (a discussion of the basic components by the drafter of the UDITPA).

[54]This "income-splitting" is not a simple process. *See* STATE AND LOCAL TAXATION, *supra* note 45, at 490-504.

[55]UDITPA, *supra* note 51, § 1(a).

[56]*Id.* at § 1(e).

[57]*Id.* at §§ 4-8; *see* Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations*, 29 VAND. L. REV. 401, 406-07 (1976) (a detailed description of the specific allocation of non-business income as well as criticism of the income-splitting as lacking a reasonable basis).

[58]UDITPA, *supra* note 51, § 7.

[59]*Id.* at §§ 9-17. *See supra* note 50.

[60]If this formula does not result in a fair reflection of the taxpayer's state ac-

The Compact[61] is an interstate taxation agreement with regard to the taxation of multijurisdictional corporations which has adopted the UDITPA provisions.[62] The Compact established the Multistate Tax Commission (Commission)[63] and, pursuant to the Compact, any member state may request that the Commission perform an audit on its behalf.[64] The Compact was sustained in *United States Steel Corp. v. Multistate Tax Commission*[65] against a facial attack on the ground that it violated the compact clause of the United States Constitution.[66]

There is a third state development of importance with regard to the division of a multijurisdictional corporation—combined reporting.[67] Under combined reporting, a state determines its proportionate share of the combined income which, with respect to the members of an affiliated group of corporations, is taxable by the state. It then applies its apportionment formula to the combined income.[68] A combined

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tivities, relief may be sought under UDITPA § 18.

[61]For a succinct summary of the origins and the nature of the Compact, see Hellerstein, *State Taxation Under the Commerce Clause: An Historical Perspective*, 29 VAND. L. REV. 335, 341 (1976).

[62]*See supra* note 51.

[63]Composed of one member from each member state, the Commission is the governing and administrative body of the Compact. The Commission is empowered to formulate regulations which address allocation and apportionment of income for income tax purposes. The regulations are merely advisory and not binding on any state unless it adopts them. *See* STATE AND LOCAL TAXATION, *supra* note 45, at 544.

[64]*See* article VI of the Compact in 1 [All States Unit] ST. & LOC. TAX SERV. (P-H) ¶ 6310.

[65]434 U.S. 452 (1978). *See* Dexter, *An Analysis of the Supreme Court's* U.S. Steel *Decision Upholding Multistate Tax Compact*, 48 J. TAX'N 368 (1978).

[66]434 U.S. at 472-78. The Court concluded that the existence of the Commission did not enhance the political power of the member states so as to encroach upon the supremacy of the United States. *Id.* at 472. The Court also upheld the Compact over challenges based on commerce clause and fourteenth amendment grounds. *Id.* at 478-79. For the text of the compact clause, see U.S. CONST. art. I, § 10, cl. 3.

[67]Peters, *Use of Combined Reporting Required by Increasing Number of States*, 41 J. TAX'N 375 (1974). The Commisson has been advocating the use of combined reporting. *See* Corrigan, *Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response*, 29 VAND. L. REV. 423, 439-41 (1976). For a general introduction to combined apportionment and allocation with regard to multicorporate enterprises, see STATE AND LOCAL TAXATION, *supra* note 45, at 438-43, 520-26. For the background with respect to the development of combined reporting and its relationship to separate accounting and formulary apportionment, see HALE & KRAMER, *supra* note 28, at 60-79.

[68]Rudolph, *supra* note 44, at 197-201. In this sense, a prerequisite to combined reporting is that the affiliated group be a unitary business. The income of separate but related corporations determined to be engaged in a unitary business is combined to calculate the tax liability of the members of the related corporate group. After the elimination of certain intercorporate transactions, such as dividends, the net income is that of the combined group and the apportionment formula includes the factors of the members of the combined group. For a discussion of combined reporting, see Keesling, *A Current Look at the Combined Report and Uniformity in Allocation Practices*, 42 J. TAX'N 106 (1975). The combined report usually includes only related corporations in which the parent corporation owns, directly or indirectly, more than 50%

report is not a consolidated tax return; rather, it has the qualities of an information return.[69] Combined reporting is applied by some states to multijurisdictional corporations which are operating within the United States, outside of the United States, or both.[70] When formulary apportionment is applied to the combined income of an affiliated group of corporations consisting of both foreign corporations operating outside of the United States and one or more corporations doing business within the taxing state, the method is commonly referred to as worldwide combined reporting.[71]

Congress has not fully exercised its power to legislate in the area of state taxation.[72] The application of any legislation which has been enacted has, in every instance, been very narrow in scope.[73] The Supreme Court has acknowledged both the limitations of any judicial resolution of state taxation controversies[74] and the appropriateness of congressional action.[75] Proposed legislation placing limitations on the states' power to tax the income of multijurisdictional corporations has been considered in recent years.[76] For example, bills have been proposed to limit the taxation of foreign-source income of multinational corporations.[77] The most recent legislative efforts with regard to the taxation of foreign-source income have been concerned with prohibiting the states from using worldwide combined reporting and restricting the states in the taxation of foreign-source dividends.[78] The

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of the stock. *See* Buresh & Weinstein, *Combined Reporting: The Approach and Its Problems*, 1 J. STATE TAX'N 5, 8 (1982).

[69]*See* Buresh & Weinstein, *supra* note 68, at 6-7.

[70]The application of combined reporting is based either on statutory provisions relating to such reports or on judicial or administrative decisions construing combined reporting statutory provisions. *See, e.g.*, F. W. Woolworth Co. v. Director of Div. of Taxation, 45 N.J. 466, 213 A.2d 1 (1965).

[71]*See* Hellerstein, *State Income Taxation of Multijurisdictional Corporations: Reflections on* Mobil, Exxon, *and H.R. 5076*, 79 MICH. L. REV. 113, 156 (1980); G.A.O. REPORT-1982, *supra* note 3, at 31.

[72]Pub. L. No. 86-272, *see supra* note 43, was the first time that Congress passed legislation concerning the power of the states to tax the income of corporations engaged in interstate commerce. Except for this legislation, the power of Congress to regulate state taxation of the income of interstate corporations has been virtually unexercised.

[73]Since the enactment of Pub. L. No. 86-272, Congress has passed other legislation limiting the power of the state to tax in certain well-defined areas. *See, e.g.*, 15 U.S.C. § 78bb(d) (1976) (stock transfer taxes); 49 U.S.C. § 11503 (Supp. V 1981) (railroad property); 49 U.S.C.A. § 11503a (West 1983) (motor carrier property).

[74]Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959).

[75]Moorman Mfg. Co. v. Bair, 437 U.S. 267, 280 (1978).

[76]*See* Madere, *State Taxation After* Mobil *and* Exxon, 33 TAX EXEC. 103, 127-31 (1981).

[77]For a thorough summary and analysis of this legislation, see Hellerstein, *supra* note 71, at 154.

[78]S. 655, 97th Cong., 1st Sess. (1981); H.R. 1983, 97th Cong., 1st Sess. (1981). No final action was taken on these bills. For a discussion of their constitutional

issue of whether and how to include the income from foreign corporations in a taxpayer's apportionable income has not only been treated extensively in congressional hearings, but has also been of central importance in recent tax treaty negotiations.[79]

IV. THE UNITARY BUSINESS PRINCIPLE

A significant area in which substantial uniformity exists among all of the states which tax multijurisdictional corporations, then, is the use of formulary apportionment.[80] The application of formulas to apportion the income of a multijurisdictional corporation, however, is permitted only in the case of a unitary business.[81] The Supreme Court has recently reaffirmed that an essential prerequisite of apportionability for state taxation of a multijurisdictional enterprise is adherence to the unitary business principle.[82] The unitary business principle is a historical concept which has been developed throughout this century by the Supreme Court. While this principle has been the subject of much commentary,[83] the determination of whether a business satisfies the unitary business principle is no easy task. The difficulty stems from the definitional criteria for determining whether a corporate enterprise should be characterized as a single unitary enterprise for tax purposes.[84]

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ity, see Dexter, *State Taxation of Multinationals: Are the Mathias and Conable Bills Constitutional?*, 14 TAX NOTES 715 (1982).

[79]For example, the United States-United Kingdom Income Tax Treaty originally contained a provision which substantially restricted the ability of the states to use combined reporting and formulary apportionment with regard to United States corporations which are subsidiaries of United Kingdom corporations. The provision was eventually deleted from the treaty. *See* Hellerstein, *supra* note 71, at 161.

[80]*See supra* notes 46-50 and accompanying text.

[81]"Formulary apportionment, which takes into account the entire business income of a multistate business in determining the income taxable by a particular state, is constitutionally permissible only in the case of a unitary business." ASARCO Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103, 3111 n.14 (1982) (quoting Rudolph, *supra* note 44, at 183-84).

[82]ASARCO Inc. v. Idaho State Tax Comm'n, 102 S. Ct. 3103, 3110 (1982).

[83]*See* Hellerstein, *Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business*, 21 NAT. TAX J. 487 (1968); Rudolph, *supra* note 44; Dexter, *supra* note 45. For other scholarly discussions of the unitary business concept, see ALTMAN & KEESLING, *supra* note 45, at 97-102; STATE AND LOCAL TAXATION, *supra* note 45, at 504-56; Dexter, *Taxation of Income from Intangibles of Multistate-Multinational Corporations*, 29 VAND. L. REV. 401 (1976); Keesling, *A Current Look at the Combined Report and Uniformity in Allocation Practices*, 42 J. TAX'N 106 (1975); Keesling & Warren, *The Unitary Concept in the Allocation of Income*, 12 HASTINGS L.J. 42 (1960).

[84]For a discussion of the Supreme Court's unwillingness to settle upon a single definition of the scope of a unitary business, see Hellerstein, *supra* note 71, at 148-51.

A. Origins

The origin of the unitary business principle lies in state ad valorem property tax cases.[85] At the turn of the century, a so-called unit rule was designed to apply ad valorem taxes to interstate utility systems[86] and was also applied in early railroad cases.[87] This tax concept assumed that the value of a railroad was a function of the rail system as a whole; therefore, a formula was developed to divide the value of the rail system as a unit among all of the jurisdictions within which it operated.[88] These cases provide the basis for the contemporary proposition that all of the properties of a unitary business utilized in the operations of the business, whether it conducts the business in a single or multiple corporate form, are subject to a reasonable apportionment formula.[89] Subsequently, the unit rule was incorporated into the field of income taxation.

B. Developments: Corporate Income Tax Cases

The seminal case on formulary apportionment is *Underwood Typewriter Co. v. Chamberlain*[90] decided by the United States Supreme Court in 1920. This case involved the imposition of a net income tax on a manufacturing and sales corporation operating in different states. The corporation had its manufacturing plants and substantial property located within the taxing state while a greater portion of its sales were made in other states.[91] The taxing state apportioned income on the basis of a single-factor property formula.[92] The corporation argued that the formula taxed "income arising from business conducted beyond the boundaries of the State" in violation of the due process clause.[93] The Court rejected the due process objection and concluded that the formula resulted in a fair apportionment reaching only profits generated in the state.[94] *Underwood*, then, sanctioned formulary ap-

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[85]Dexter, *supra* note 45, at 184.

[86]*Id. See* Isaacs, *The Unit Rule*, 34 YALE L.J. 838 (1926).

[87]*See, e.g.*, Union Pacific Ry. v. Cheyenne, 113 U.S. 516 (1884).

[88]The Supreme Court summarized its holdings in this regard and considered what constituted a unitary business in Adams Express Co. v. Ohio State Auditor, 165 U.S. 194, 220-23 (1897).

[89]Dexter, *supra* note 45, at 191.

[90]254 U.S. 113 (1920).

[91]*Id.* at 117-19. The corporation earned income through a "series of transactions" beginning with manufacturing in the state and ending with sales outside of the state. *Id.* at 120-21.

[92]The single-factor formula using property as a basis computes the ratio of real and tangible personal property values within the state to the value of that same property owned in total by the corporation so as to determine the state's proportionate share of income. *Id.* at 118.

[93]*Id.* at 120.

[94]*Id.* at 121. The Court acknowledged the difficulty of determining the state's fair proportionate share of taxable income by accounting only for the manufacturing

portionment as a proper method of dividing the net income of a corporation derived from the interstate operations of a vertically integrated business among nondomiciliary states.

In 1924, the Court extended the *Underwood* reasoning to permit a taxing state to impose taxes based on apportionment of net income earned by a foreign corporation in *Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission.*[95] This case involved a vertically integrated operation across national boundaries. The unitary business was a British corporation which manufactured its product in England and sold it in the United States as well as in England.[96] The taxing state used a single-factor property formula similar to that used in the *Underwood* case and included the foreign income in the total taxable income to be apportioned.[97] Even though the corporation had showed a loss from United States operations on its federal income tax return, the use of the formula resulted in income taxable by the state.[98] The Supreme Court sustained the tax over due process objections basing its holding on a finding that the corporation was carried on as a unitary business.[99]

In 1931, in *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell,*[100] a case involving facts strikingly similar to those at issue in *Underwood* and *Bass*, the Supreme Court upheld the corporation's challenge to a state tax based on apportionment.[101] The corporation manufactured its product in the taxing state, but its principal offices

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within the state. *Id.* at 120-21. *See also* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278-80 (1978) (formulary apportionment is used as a rough approximation of the net income of a corporation attributable to the taxing jurisdiction).

[95]266 U.S. 271 (1924). The *Bass* case involved a franchise tax measured by net income attributable to the taxing state. *Id.* at 277. A franchise tax is an assessment for the privilege of doing busines in the taxing jurisdiction. The significance of this case lies in the inclusion of foreign-source income into preapportionment taxable income. *Id.* at 282. In this regard, foreign-source income refers to income generated outside of the United States.

[96]*Id.* at 278-79.

[97]The single-factor formula using property in this case is different from that used in *Underwood.* In the instant case the state determined that the property owned in total by the corporation contributed to generating dividend income. *Id.* at 277-80.

[98]*Id.* at 279-80.

[99]*Id.* at 282. Although the term "unitary business" is not used in *Underwood*, the Court upheld the tax in *Bass* by citing *Underwood. Id.* at 280-82. One may infer that the corporation described in *Underwood* was a unitary business.

[100]283 U.S. 123 (1931).

[101]*Id.* at 136. It is interesting to note that a taxpayer has not often successfully prevailed in challenging the results of a taxing state's formulary apportionment of net income. Some of the successful taxpayer cases have been the following: Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975); Standard Pressed Steel Co. v. Dep't of Revenue, 419 U.S. 560 (1975); Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968); Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948).

and storage facilities were in another state.[102] Its worldwide net income resulted from sales in the United States, Canada, and Europe.[103] The taxing state utilized a single-factor property formula and attempted to tax from sixty-six to eighty-five per cent of the corporation's net income, while the corporation offered strong evidence derived from a separate accounting procedure which showed that at most twenty-three per cent of its profit was attributable to its manufacturing in the taxing state.[104] The Court characterized a manufacturing and marketing enterprise in several jurisdictions as unitary[105] and did not question whether the corporation was in fact a unitary business. The Court simply held that the formula based on a single-factor analysis was invalid because the result in this case was unreasonable.[106] The precedential value of this opinion is of limited significance because the majority of the states presently have a three-factor apportionment formula which has survived judicial scrutiny.[107]

In the 1942 decision of *Butler Brothers v. McColgan*,[108] the Court approved the use of the three-factor apportionment formula and extended the application of the unitary business concept from manufacturing enterprises to a wholly mercantile operation. In this case, a single corporation used a central office in one state to purchase all of the goods and inventory for branch wholesale distribution centers in several states, including the taxing state.[109] The central office also provided resources such as advertising, accounting, and management for the branches. The central office allocated the costs of its operations among the branch offices and, by means of separate accounting, accurately determined a loss for the taxing state.[110] The state applied the three-factor formula which resulted in a tax liability.[111] The corporation, however, maintained that the application of the formula in this case resulted in the taxation of extraterritorial values in violation of the due process clause.[112]

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[102]283 U.S. at 126-27.

[103]*Id.* at 127.

[104]*Id.* at 128-34.

[105]*Id.* at 133.

[106]The statute was applied unreasonably and arbitrarily by attributing to the taxing state a percentage of income "out of all appropriate proportion to the business transacted by the [corporation] in that state." *Id.* at 135-36. The Court distinguished *Underwood* and *Bass* on the ground that the corporations in those cases failed to establish that the amount of net income with which the corporations were charged in the taxing states under the apportionment method was not reasonably attributable to the processes conducted within the borders of those states. *Id.* at 133.

[107]*See supra* notes 48-50 and accompanying text.

[108]315 U.S. 501 (1942).

[109]*Id.* at 504.

[110]*Id.* at 504-05.

[111]*Id.*

[112]*Id.* at 506-07.

The Court determined that the state properly characterized the corporation as a unitary business, focusing on the centralized management and functional integration of the interstate operations.[113] In so doing, the Court relied on a test developed by the state court,[114] the so-called three-unities test, which consists of (1) unity of ownership, (2) unity of use, and (3) unity of operation and management.[115] The Court held that the reasonableness of a particular apportionment formula may not be contested by the corporation by means of a separate accounting once the corporate enterprise has been properly characterized as a unitary business.[116]

V. State Taxation of Multinational Corporate Foreign-Source Dividends: *Mobil*

The key precedent regarding state taxation of foreign-source income is the United States Supreme Court decision in *Mobil Oil Corp. v. Commissioner of Taxes*.[117] In this 1980 decision, the Supreme Court addressed the constitutional limitations on a nondomiciliary state's taxation of a domestic corporation's dividend income received from foreign subsidiaries and affiliates.[118] The Court rejected both due process and commerce clause objections and held that it is permissible for a state to include foreign-source dividends in a multinational corporation's apportionable tax base so long as there is a unitary relationship between the payor foreign corporation and the recipient domestic corporation.[119] The reasoning of the Court in arriving at its holding has generated considerable commentary.[120]

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[113]*Id.* at 508.

[114]Butler Bros. v. McColgan, 17 Cal.2d 664, 111 P.2d 334 (1941), *aff'd*, 315 U.S. 501 (1942).

[115]315 U.S. at 508-09. *See* Boren, *Separate Accounting in California and Uniformity in Apportioning Corporate Income*, 18 U.C.L.A. L. Rev. 478, 490-94 (1971) (discussing the development of the three-unities test together with modifications made by the California courts). Commentators have been critical of the many ambiguities of the three-unities test and its modifications. *See* Dexter, *supra* note 45, at 192-98. For example, the test gives no significance to the distinction between in-state business and out-of-state business.

[116]315 U.S. at 508-09. Even though it was not decided on constitutional grounds, General Motors v. District of Columbia, 380 U.S. 553 (1965), stands as the Supreme Court's endorsement of the three-factor formula noting its prevalence among the taxing states and its justification as a rough practical approximation of the distribution of a corporation's sources of income and the social cost for which the corporation is responsible.

[117]445 U.S. 425 (1980).

[118]*Id.* at 427.

[119]For an excellent analysis of the *Mobil* decision together with an analysis of proposed federal legislation for the restriction on state taxation of foreign-source income, see Hellerstein, *supra* note 71.

[120]Many articles have been written which are mostly critical of the *Mobil* decision. *See, e.g.*, Chisum, *State Taxation of Interstate Corporate Income from Intangible Prop-*

Mobil, a New York corporation authorized to do business in Vermont, was engaged in an integrated, worldwide business which involved the production, refinement, distribution, and sale of petroleum products.[121] Mobil's foreign business was conducted through wholly and partly owned subsidiaries and affiliates, none of which was incorporated in or conducted business in Vermont.[122] Mobil's activities in Vermont were limited to the marketing of petroleum products and formed only a small part of its worldwide business.[123]

This dispute involved Mobil's tax liability to Vermont for the years 1970, 1971, and 1972. Vermont imposed a net income tax on every corporation doing business in the state.[124] Net income was composed of taxable income as defined by the Internal Revenue Code.[125] Because Mobil was engaged in business both within and without the state, Vermont used the three-factor apportionment formula to determine a fair and equitable portion of the net income attributable to Mobil's commercial activities in Vermont.[126] On its federal income tax returns, Mobil's net income included substantial dividends received from its

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erty: Due Process and Commerce Clause Limitations, 13 TEX. TECH. L. REV. 1 (1982); Corrigan, *How Multistate Tax Commission Conducts Joint Audits and Controls Income Allocations*, 25 TAX'N FOR ACCT. 108 (1980); Corrigan, *Toward Uniformity in Interstate Taxation*, 11 TAX NOTES 507 (1980); Corrigan, Mobil-*izing Interstate Taxation*, 13 TAX NOTES 803 (1981); Dexter, *Tax Apportionment of the Income of a Unitary Business: An Examination of* Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 1981 B.Y.U. L. REV. 107; Feinschreiber, *State Taxation of Foreign Dividends After* Mobil v. Vermont: *Adjusting the Apportionment Formula*, 6 INT'L TAX J. 267 (1980); Hellerstein, *Allocation and Apportionment of Dividends and the Delineation of the Unitary Business*, 14 TAX NOTES 155 (1982); Keesling, *The Impact of the* Mobil *Case on Apportionment of Income*, 1981 B.Y.U. L. REV. 87; Killefer, *State Taxation of Commerce*: Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 8 J. CORP. TAX'N 3 (1981); Nackenson, *The Impact of* Mobil v. Vermont *on Interstate Taxation*, 6 INT'L TAX J. 323 (1980); Peters, *Supreme Court's* Mobil *Decision on Multistate Income Apportionment Raises New Questions*, 53 J. TAX'N 36 (1980); Comment, *State Taxation of Foreign Source Corporate Dividends: Another Conquest of the Expanded Unitary Business Doctrine*, 22 URB. L. ANN. 229 (1981).

[121]445 U.S. at 427-28.

[122]*Id.* at 428.

[123]*Id.*

[124]*Id.* at 429. VT. STAT. ANN. tit 32, §§ 5811(15), 5832 (1981).

[125]445 U.S. at 429. Under the Vermont state taxation system, net income is defined as the taxable income of the taxpayer "under the laws of the United States." VT. STAT. ANN. tit. 32, § 5811(19) (1981).

[126]445 U.S. at 429. Vermont's formula multiplied the corporation's net income "by a fraction representing the arithmetic average of the ratios of sales, payroll, and property values within Vermont to those of the corporation as a whole." *Id. See* VT. STAT. ANN. tit. 32, § 5833(a) (1981). For the taxable year 1972, the ratios of Mobil's Vermont sales, payroll, and property to those factors "everywhere" were approximately .24%, .06%, and .25%, respectively. 445 U.S. at 429 n.2. Vermont applied the fraction produced by the formula to the corporation's federal taxable income with minor modifications which, for example, excluded income exempt from state taxation under federal law. *Id.* at 429. VT. STAT. ANN. tit. 32, § 5811(18) (1981).

foreign subsidiaries and affiliates.[127] On its Vermont returns, Mobil subtracted from federal taxable income its foreign-source dividend income, which resulted in losses for 1971 and 1972.[128] The Vermont Department of Taxes restored the items to the preapportionment tax base and assessed accordingly.[129]

Mobil argued that the restoration of the foreign-source income to its preapportionment tax base violated the due process clause as well as the commerce clause.[130] In addition, Mobil petitioned for modification of the apportionment.[131] The Supreme Court of Vermont sustained the tax on the foreign-source dividends,[132] and on appeal, the United States Supreme Court affirmed the judgment.[133]

Mobil proposed three principal arguments for exclusion of its foreign-source dividends from income subject to formulary apportionment.[134] First, the corporation argued that the lack of a nexus between the taxing State and either the parent corporation's management of its investments in the subsidiaries or the business activities of the subsidiaries precluded taxation of its dividend income.[135] Thus, the state tax on this foreign income violated due process. In considering this due process clause argument, the Court determined that a sufficient nexus existed between the parent corporation's activities and the taxing state to permit the assessment of the tax. The Court found that there was nothing unique about foreign-source dividends so as to prohibit their taxation.[136] To the extent that a multinational corporation operates as a functionally integrated enterprise and earns dividends from subsidiaries or affiliates which reflect profits derived from such an enterprise, those dividends are treated as income which is to be appropriately included in the parent corporation's apportionable tax base pursuant to the unitary business principle.[137] The Court reasoned that it would be misleading to characterize the

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[127]Mobil's federal income tax returns for 1970-72 showed taxable income of approximately $220 million, $308 million, and $233 million, respectively. 445 U.S. at 430. Of that, net dividend income accounted for approximately $174 million, $283 million, and $280 million. *Id.*

[128]*Id.* Mobil subtracted amounts representing interest and foreign taxes as well as dividends. *Id.* at 430 n.6.

[129]*Id.* at 431-32. Mobil's aggregate tax liability for the three years was calculated by Vermont at over $76,000. *Id.* at 432.

[130]*Id.* at 432.

[131]*Id.* Vermont allows a corporation to petition for relief where the three-factor formula results in an unfair apportionment.

[132]Mobil Oil Corp. v. Comm'r of Taxes, 136 Vt. 545, 394 A.2d 1147 (1978).

[133]445 U.S. at 449.

[134]*Id.* at 436.

[135]*Id.*

[136]*Id.* at 438-39. Mobil had claimed that foreign-source dividends by their very nature are not apportionable income. *Id.* at 434.

[137]*Id.* at 440.

dividends received in a unitary business as proceeding from a separate identifiable source because separate accounting may fail to account for contributions to profitability, such as integrated functions, centralized management, and economies of scale which arise from the operation of the business as a whole.[138]

Therefore, the nondomiciliary corporation must show that foreign-source income was earned in the course of activities unrelated to its activities in the taxing state in order to establish that the income is not subject to formulary apportionment.[139] The Court found that Mobil failed to demonstrate that the activities of its foreign subsidiaries were distinct from its marketing activities in the taxing state.[140] The unitary business principle remains the linchpin of the Court's decision with regard to the due process analysis of state taxation of foreign-source income.[141] A multinational corporation must prove that there is not an underlying unitary business involving the operations producing the foreign-source income in order to exclude such income from a state's apportionable tax base.[142]

Second, Mobil argued that it was subject to an unconstitutional burden of multiple taxation because the foreign-source dividends would be potentially taxable in full in the state of its commercial domicile by means of specific allocation.[143] On this commerce clause issue, the Court decided that where the foreign-source income bears relation to benefits conferred by several states, formulary apportionment, rather than specific allocation, is ordinarily the acceptable means of

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[138]*Id.* at 438.

[139]*Id.* at 439. Because Mobil failed to sustain its burden of proving any unrelated business activity on the part of its subsidiaries and affiliates, the Court did not have to decide whether the foreign-source dividends would be apportionable in the absence of a unitary business relationship. The Court added a critical qualification to its holding that the foreign-source dividends were not shown to be exempt, as a matter of due process, from apportionment in this instance:

> We do not mean to suggest that all dividend income received by corporations operating in interstate commerce is necessarily taxable in each State where that corporation does business. Where the business activities of the dividend payor have nothing to do with the activities of the recipient in the taxing State, due process considerations might well preclude apportionability, because there would be no underlying unitary business.

Id. at 441-42.

[140]*Id.* at 439.

[141]*Id.*

[142]The corporate form of a business may have nothing to do with the underlying economic realities of the business enterprise and transforming operating income into dividends ought not impair the apportionability of income. *Id.* at 440-41. It is interesting to note how the Court framed the issue and confined its opinion to the issue of "whether there is something about the character of income earned from investments in affiliates and subsidiaries operating abroad that precludes, as a constitutional matter, state taxation of that income by the apportionment method." *Id.* at 435.

[143]*Id.* at 436.

taxation.[144] The Court acknowledged that the state of commercial domicile may have the authority to impose some tax on the dividend income;[145] however, the Court concluded that there is no reason to find the taxing authority of the domiciliary state exclusive in cases in which the dividend income proceeds from a unitary enterprise where some part of that business operates in states other than the state of the corporation's commercial domicile.[146] The Court ruled the domicile analysis based on property tax principles carries little force in the context of income taxation.[147] The Court determined that a non-domiciliary state's interest in taxing its proportionate share of a multinational corporation's dividend income was not preempted by any interest of the state of commercial domicile.[148]

Third, Mobil argued that the foreign-source of the dividends subjected the corporation to a risk of multiple taxation at the international level.[149] The corporation did not broadly propose that foreign-source income is totally sheltered from state taxation; rather, Mobil maintained that federal tax policies against double taxation of foreign-source income required that the income must be specifically allocated to the state of commercial domicile for imposition of state taxation.[150] Mobil asserted that the Court's decision in *Japan Line, Ltd. v. County of Los Angeles*[151] required the allocation of the tax to the state of the corporation's domicile, because apportionment's inherent inaccuracy would create a risk of multiple taxation which the Court would be unable to correct.[152] The Supreme Court found that the tax did not impose an undue burden on foreign commerce.[153] The Court distin-

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[144]*Id.* at 446.

[145]*Id.* at 445.

[146]*Id.* at 445-46.

[147]*Id.* at 445. The Court noted that cases upholding allocation to a single situs for property tax purposes have distinguished income tax situations involving formulary apportionment. *See* Wheeling Steel Corp. v. Fox, 298 U.S. 193, 212 (1936).

[148]445 U.S. at 445-46. The constitutionality of a state tax assessed pursuant to formulary apportionment should not depend on the vagaries of the tax policies of the state of commercial domicile of a corporation. *Id.* at 444. The commercial domicile in this case did not tax the dividend income in question and the Court noted that "actual multiple taxation is not demonstrated on this record." *Id.*

[149]*Id.* at 436.

[150]*Id.* at 446.

[151]441 U.S. 434 (1979). *See supra* notes 20-21 and accompanying text.

[152]445 U.S. at 446.

[153]*Id.* at 449. The Court rejected Mobil's argument on several grounds. First, the argument focused on the effect of foreign taxation when the important issue was the effect of domestic taxation. *Id.* at 447. Second, the argument extended to any income arguably earned in foreign commerce which would force the states to determine whether the income has a foreign source. *Id.* Third, the argument underestimated the Court's ability to correct discriminatory taxation of foreign commerce resulting from multiple

guished the *Japan Line* decision on the ground that it involved a state property tax and that the analysis of that opinion did not apply to an income tax.[154] The Court did not provide any analysis supporting this distinction. In addition, the Court noted that both federal and state taxation of income is the norm and that federal and state treatment of foreign-source income for tax purposes need not be similar, absent some congressional directive.[155]

In summary, the Court held that neither the due process clause nor the commerce clause requires a preference for specific allocation, rather than formulary apportionment, of foreign-source dividend income.[156] The decision affirms formulary apportionment of foreign-source dividends where there is a unitary business relationship among the payor foreign subsidiaries or affiliates and the recipient parent corporation; however, it does not require that the states employ this method. Even though the holding in *Mobil* is limited as such, the analysis of this decision remains at the center of the issues concerning the state taxation of foreign-source income.

The most important issue unanswered by the *Mobil* opinion is the criteria for a fair apportionment formula to be used in the context of foreign-source income. The Court did not address a second due process clause requirement which necessitates a rational relationship between the income taxed and the activities of the corporation within the state.[157] Arguably Vermont's apportionment formula violated this second requirement because it failed to reflect the foreign sales, property, and payroll values of the subsidiary corporations.[158]

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taxation. *Id.* Fourth, specific allocation would not necessarily entail less of a tax on foreign-source income. *Id.* at 447-48.

[154]The Court properly rejected the corporation's reliance upon *Japan Line*, which was concerned with property taxation of instrumentalities of foreign commerce. *Japan Line* dealt with multiple taxation on a purely international level, not on an interstate level as in *Mobil*. Federal interests necessitate that any state taxation of foreign commerce must meet stricter standards of review than like taxation imposed solely on interstate commerce.

[155]445 U.S. at 448.

[156]*Id.* at 449.

[157]The Court avoided this issue when it explained that Mobil's "election to attack the tax base rather than the formula substantially narrows the issues before us. In deciding this appeal, we do not consider whether application of Vermont's formula produced a fair attribution of [Mobil's] dividend income to that State." *Id.* at 434.

[158]In his dissenting opinion, Justice Stevens expressed the view that Vermont's formula was indefensible because, "Unless the sales, payroll, and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause Mobil's Vermont income to be overstated." *Id.* at 461 (Stevens, J., dissenting). For the position that apportionment formula factors should be adjusted by taking into account the prop-

VI. *ASARCO* AND *Woolworth:* DUE PROCESS LIMITATIONS ON THE STATE TAXATION OF FOREIGN-SOURCE INCOME

The concept of a unitary business has expanded from single corporations or an affiliated group of corporations doing business in several states to include the income of a nondomiciliary corporation derived from subsidiaries and affiliates operating outside of the United States. *Mobil* endorsed the application of formulary apportionment to such foreign-source income.[159] The principal basis for finding any limitation on the power of a state to impose formulary apportionment on multinational enterprises is a successful demonstration that members of a group of affiliated corporations are in fact engaged in discrete business enterprises unrelated to their activities in the state.[160] For the first time since the 1931 decision in *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*,[161] the corporate taxpayers in the companion cases of *ASARCO Inc. v. Idaho State Tax Commission*[162] and *F. W. Woolworth Co. v. Taxation and Revenue Department*[163] succeeded in obtaining a ruling from the Supreme Court that a state tax on foreign-source income was unconstitutional by showing that certain income had been derived from discrete business enterprises.[164]

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erty, payroll, and sales of the payor subsidiaries, when dividend income is included in a corporation's tax base, see Feinschreiber, *State Taxation of Foreign Dividends After* Mobil v. Vermont: *Adjusting the Apportionment Formula*, 6 INT'L TAX J. 267 (1980); Nackenson, *The Impact of* Mobil v. Vermont *on Interstate Taxation*, 6 INT'L TAX J. 323 (1980). For a more thorough discussion of the unitary business principle in a purely interstate context, see Exxon Corp. v. Dep't of Revenue, 447 U.S. 207 (1980).

The analysis developed in *Mobil* was subsequently applied by the Supreme Court in *Exxon* to income earned from the domestic operations of a vertically integrated petroleum products corporation. The Court reviewed the record analyzing the actual business operations of the corporation which disclosed a centralized management providing the means to operate an optimum short-term operational program. 447 U.S. at 224. The marketing activities in the taxing state were found to be interdependent with the integrated operations of the corporation as a whole. Centralized purchasing contributed to overall profits, centralized coordination achieved operating efficiencies, and overall product distribution was enhanced by administration from the national headquarters. *Id.* The Court concluded that the corporation was a "highly integrated business which benefits from an umbrella of centralized management and controlled interaction." *Id.*

[159]445 U.S. at 449.

[160]*Id.* at 439.

[161]283 U.S. 123 (1931). *See supra* notes 100-07 and accompanying text.

[162]102 S. Ct. 3103 (1982).

[163]102 S. Ct. 3128 (1982).

[164]For a discussion of *ASARCO* and *Woodworth*, see Floyd, *The "Unitary" Business in State Taxation: Confusion at the Supreme Court?* 1982 B.Y.U. L. REV. 465; Peters, *Supreme Court Requires Unitary Relationship Before States Can Tax Investment Income*, 57 J. TAX'N 314 (1982); Seago, *The Revitalization of the Unitary Business Principle—*ASARCO *and* Woolworth, 1 J. STATE TAX'N 101 (1982).

A. Reaffirmation of the Unitary Business Limitation: ASARCO

In *ASARCO*,[165] a domestic corporation challenged a nondomiciliary state's taxation of income received in the form of dividends, interest, and capital gains from subsidiaries on both due process and commerce clause grounds. The Supreme Court decided the case under due process clause considerations only[166] and found that the nondomiciliary state exceeded its jurisdiction to tax this income where the business activities of the payor subsidiaries had nothing to do with the recipient parent corporation's activities in the taxing state.[167] The Court also found the due process requirement of a rational relationship between the income attributed to the taxing state and the values attributable to the state was not met.[168]

1. Facts and Lower Court Developments.—ASARCO, the parent corporation, mined, smelted, and refined nonferrous metals in several states. Its commercial domicile was in New York.[169] ASARCO's primary activity in Idaho was the operation of a silver mine, but it mined and marketed other nonferrous metals and maintained a managerial office for the operations of its regional mining division in Idaho.[170] The Court examined the taxability of income ASARCO received from dividends, interest, and capital gains[171] from five corporations in which it held substantial ownership interests.[172]

Idaho had adopted a version of the UDITPA.[173] Consequently, Idaho split corporate net income into either business income or nonbusiness income.[174] Under the Idaho statute, business income included income from intangible property, such as interest, dividends, and

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[165]102 S. Ct. 3103.

[166]*Id.* at 3115 n.23.

[167]*Id.* at 3115. For an explanation of the two requirements to be satisfied under the due process clause, see *supra* notes 24-27 and accompanying text.

[168]102 S. Ct. at 3115.

[169]*Id.* at 3105.

[170]*Id.* Idaho calculated that approximately 2.5% of ASARCO's total business activities took place within the state. *Id.*

[171]ASARCO had received other forms of intangible income during the applicable period, but the appropriate treatment of that income for tax purposes was not at issue before the Supreme Court. *Id.* at 3105 n.1. The issue was before the Idaho Supreme Court, however, and it ruled that ASARCO's receipt of certain rents and royalties, as well as its receipt of other dividends from another subsidiary, constituted apportionable income. *See* American Smelting & Ref. Co. v. Idaho State Tax Comm'n, 99 Idaho 924, 935-37, 592 P.2d 39, 50-52 (1979).

[172]102 S. Ct. at 3106. During the applicable period, ASARCO owned approximately 34% to 53% of the stock in the corporations. *Id.* at 3106 n.2.

[173]*Id.* at 3106. For a discussion of the UDITPA, see *supra* notes 51, 55-60 and accompanying text.

[174]102 S. Ct. at 3106.

capital gains, when the acquisition, management, or disposition of that property was an integral or necessary component of the corporation's business operations.[175] Idaho apportioned business income by means of an equally weighted three-factor formula and included its proportionate share of the corporation's business income in the state's taxable income.[176] Nonbusiness income was allocated to the corporation's commercial domicile.[177]

Idaho, a member of the Multistate Tax Compact, requested the Multistate Tax Commission to audit ASARCO.[178] The Commission determined that the dividends, interest, and capital gains received by ASARCO from its five subsidiaries constituted business income and consequently added the amounts to ASARCO's income to be apportioned, even though it also determined that the relationships of these subsidiaries with the parent corporation were insufficient to justify unitary treatment under a combined report.[179] The state tax commission adopted the Commission's adjustments and upheld its conclusions with respect to the characterization of the dividends, interest, and capital gains of the five subsidiaries as business income.[180]

After an adverse lower court decision,[181] the state tax commission appealed to the Idaho Supreme Court.[182] In rejecting due process and commerce clause challenges, the court reaffirmed the characterization of the dividends, interest, and capital gains from the five subsidiaries as apportionable business income of the parent corporation.[183] The United States Supreme Court subsequently reversed this decision.[184]

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[175]*Id.*

[176]*Id.*

[177]*Id.* "Nonbusiness" income was defined as "all income other than business income." *Id.*

[178]*Id.* at 3107. For a discussion of the Multistate Tax Compact and the Commission, see *supra* notes 61-66 and accompanying text.

[179]102 S. Ct. at 3108. For a discussion of the principles and uses of combined reporting, see *supra* notes 67-71 and accompanying text. The Commission recommended that ASARCO and six other of its subsidiaries which it wholly owned be characterized as a single corporation. The Commission combined ASARCO's income with the income of the six subsidiaries and disregarded the six subsidiaries' dividend payments to the parent corporation as intracompany accounting transfers. 102 S. Ct. at 3107. The propriety of this treatment of the six subsidiaries was not an issue before the Supreme Court. *Id.* at 3108.

[180]*Id.* 102 S. Ct. at 3108.

[181]ASARCO petitioned for review, and the state district court, in an unpublished opinion, overruled the state tax commission's determination that the dividends, interest, and capital gains of the five subsidiaries constituted business income. *Id.*

[182]American Smelting & Ref. Co. v. Idaho State Tax Comm'n, 99 Idaho 924, 592 P.2d 39 (1979).

[183]*Id.* at 935-37, 592 P.2d at 50-52.

[184]The Supreme Court first vacated and remanded the case for reconsideraton in light of its decision in *Mobil.* ASARCO Inc. v. Idaho State Tax Comm'n, 445 U.S. 939

2. The Majority Opinion.—After reaffirming the unitary business criteria developed in *Mobil*,[185] the Court examined "the way in which the corporate enterprise is structured and operates, and . . . the relationship with the taxing state."[186] The most likely foreign subsidiary to be found part of a unitary business was the one in which ASARCO owned about fifty-two per cent of the stock and which sold about thirty-five per cent of its smelted but unrefined copper to ASARCO.[187] Idaho did not dispute, however, that a management agreement with the other shareholders assured that ASARCO was unable to control the subsidiary.[188]

The Court concluded that the business of the subsidiary and ASARCO's silver mining in Idaho were inadequately connected to permit unitary characterization.[189] Further, the Court found that the remaining four subsidiaries fell far short of meeting the criteria necessary for unitary treatment.[190] In summary, all of those subsidiaries were engaged in similar or related lines of business, but they were unconnected with the taxing state. The parent corporation held substantial minority or borderline majority capital stock interests in the subsidiaries. The parent corporation provided some corporate services for some of the subsidiaries and engaged in minimal business transactions with all of them.

The state did not dispute any of the facts, but merely proposed an expansion of the unitary business concept by arguing that corporate purpose should be the controlling criterion for the unitary business relationship. Thus, intangible income would be deemed a part of a unitary business when that income related to or furthered the corporation's trade or business.[191] The Court considered this definition of a unitary business too broad and unacceptable because it would transform the unitary business principle into no limitation at all.[192] The Court found that the five subsidiaries were distinct business enter-

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(1980). On remand, the Idaho Supreme Court reinstated its previous opinion. American Smelting & Ref. Co. v. Idaho State Tax Comm'n, 102 Idaho 38, 624 P.2d 946 (1981). The Supreme Court reversed that decision. 102 S. Ct. 3103 (1982).

[185]102 S. Ct. at 3109-11.

[186]*Id.* at 3115 n.22.

[187]*Id.* at 3111-12. Another 20-30% of the subsidiary's output was sold to a similarly owned corporation. *Id.* at 3111-12, 3112 n.16.

[188]*Id.* at 3112.

[189]*Id.*

[190]*Id.*

[191]*Id.* at 3114. The state relied upon the definition of business income in the UDITPA, *supra* note 51, at § 1(a). The argument was that a relationship exists between investments and the business of the owner of the investments which, without more, is sufficient to justify the apportionment of any income derived from the investments. *See* Dexter, *Tax Apportionment of the Income of a Unitary Business: An Examination of* Mobil Oil Corp. v. Commissioner of Taxes, 1981 B.Y.U. L. REV. 107, 119.

[192]102 S. Ct. at 3114.

prises which had nothing to do with ASARCO's activities in Idaho.[193] Because there was no rational relationship between the dividends, interest, and capital gains which had been attributed to the state and the intrastate values of the business enterprise, the Court held that Idaho violated the due process clause by taxing that income.[194]

3. The Dissenting Opinion.—In a strong dissent, Justice O'Connor[195] argued that business and economic sense dictated a contrary result. Justice O'Connor asserted that the Court erred in its finding that ASARCO's investments were not part of a unitary business because ASARCO failed to carry its burden of proof in at least three ways.[196] First, ASARCO did not demonstrate that its investment decision making was separate and apart from its expertise in the nonferrous metals business.[197] Second, ASARCO failed to show that its holdings in the subsidiaries were separate and apart from its management of the financial requirements of its nonferrous metals business since ASARCO presumptively used the foreign-source income as part of its working capital.[198] Third, the dissent argued that ASARCO's capital interest in the subsidiaries contributed to its nonferrous metals business advantages, maintaining that ASARCO had effective operational control of at least three of the five subsidiaries. The multinational corporate format provided greater stability to profits and the vertically integrated relationship provided assured supplies of materials and stable outlets for products.[199]

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[193]*Id.* at 3115.

[194]*Id.* at 3115-16.

[195]Both *ASARCO* and *Woolworth* were 6-3 decisions in which Justice Blackmun and Justice Rehnquist twice joined Justice O'Connor in the dissenting opinions. The dissenting opinion in *Woolworth*, however, is quite brief in that it incorporates by reference the rationale set forth in the dissenting opinion in *ASARCO*, Chief Justice Burger filed a concurring opinion in both cases, 102 S. Ct. 3140 (1982), joining the majority opinion written in both cases by Justice Powell in reliance on the majority's express statement that the Court's holdings do not preclude congressional action in this area. *See* 102 S. Ct. 3103, 3114 n.23.

[196]102 S. Ct. at 3119 (O'Connor, J., dissenting).

[197]*Id.* at 3119-20. The flaw in this argument is the explanation of how the parent corporation's expertise with respect to the investments in the subsidiaries had anything to do with the activities of the parent corporation in the taxing state.

[198]*Id.* at 3120-21. The dissent's perception of the facts differed from the undisputed facts in the record. ASARCO's stock investments were not an integral part of its business operations in Idaho. 102 S. Ct. at 3113-14 n.21.

[199]102 S. Ct. at 3121-23 (O'Connor, J., dissenting). The description of the five subsidiaries as providing assured supplies and outlets is at variance with the undisputed facts. *Id.* at 3114 n.21. As to the dissent's "business advantage" argument, the Court responded in *Woolworth*:

> Income, from whatever source, always is a "business advantage" to a corporation. Our cases demand more. In particular, they specify that the proper inquiry looks to "the underlying unity or diversity of business enterprise,"

After challenging the reasoning of the majority opinion, the dissent discussed what it judged to be the adverse consequences of the majority decision. First, the dissent suggested that perhaps no state would be able to meet due process requirements in order to include ASARCO's investment income as such in its apportionable tax base.[200] Second, the dissent detected a suggestion in the majority opinion that only a domiciliary state might enjoy a constitutional preference to tax such income.[201] Third, the dissent argued that it was possible that only those states in which the investment activities were conducted could tax the income resulting from those activities.[202] As a result, the dissent concluded that the majority opinion had "straightjacketed" the ability of the states to develop fair systems of apportionment and had curtailed the state statutory developments pursuant to the UDITPA.[203] Finally, the dissent argued that the majority's reliance on the due process clause, as opposed to the commerce clause, may preempt possible congressional action.[204]

The majority opinion acknowledged the dissenting opinion's criticism of the unitary business principle but asserted that the analysis of the dissent relies on considerations different from those identified as controlling in *Mobil*. According to the majority, *Mobil* held that the income was determined to be apportionable by the states because it was apparent that those corporations were engaged in

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Mobil, 445 U.S. at 440, not to whether the nondomiciliary parent derives some economic benefit—as it virtually always will—from its ownership of stock in another corporation.

102 S. Ct. 3128, 3135 (citing *ASARCO*, 102 S. Ct. at 3113-15).

[200]102 S. Ct. at 3124 (O'Connor, J., dissenting). *See* Dexter, *Taxation of Income From Intangibles of Multistate-Multinational Corporations*, 29 VAND. L. REV. 401, 403 (1976); McClure, *Toward Uniformity in Interstate Taxation: A Further Analysis*, 13 TAX NOTES 51, 53 (1981). This conclusion does not necessarily follow. The business of managing investments in the state of commercial domicile may be separate and apart from the activities in a nondomiciliary state. The domiciliary state may have contributed to the investment activities while the nondomiciliary state may have contributed nothing to the investment activities. *See* Seago, *supra* note 164, at 113-14.

[201]102 S. Ct. at 3124-25 (O'Connor, J., dissenting).

[202]*Id.* at 3125-26.

[203]*Id.* A review of the UDITPA and the Commission's interpretation of the Act may bear out this declaration, but it does not lend support to the implication that the interpretation of the UDITPA which was advocated in *ASARCO* and *Woolworth* by the states was either desirable or logical. *See* Peters, *supra* note 164, at 316.

[204]102 S. Ct. at 3126-28 (O'Connor, J., dissenting). The majority opinion did not address this concern: "The question of federal authority to legislate in this area—whether to lay taxes or to delegate such power—is not presented in this case, and we imply to view as to it." *Id.* at 3115 n.23. "In any event, it is difficult to understand how the limitations placed on state taxation of income having no connection with the taxing state could impede the Congress in the exercise of its power to regulate interstate commerce." Peters, *supra* note 164, at 316. This can be done provided that legislation is consistent with the *ASARCO-Woolworth* due process considerations.

unitary businesses with a continuous flow and interchange of common products. These essential factors were demonstrated to be wholly absent in this case.[205] The majority concluded that it properly applied the principles of *Mobil* but reached a wholly different result because the facts differed in these critical ways.[206]

B. Limitations on the State Taxation of Foreign-Source Income: Woolworth

F. W. Woolworth Co. v. Taxation and Revenue Department[207] reapplied the principles developed in *ASARCO*, but elaborated on the parameters of the unitary business relationship and therefore provides needed additional guidance for subsequent cases. The issues raised in *Woolworth* were resolved solely by reference to due process clause considerations. The Court held that a nondomiciliary state's taxation of a portion of the dividend income received by a domestic corporation from foreign subsidiaries which constitute discrete business enterprises and which do no business in the taxing state fails to meet established due process standards.[208]

1. Facts and Lower Court Developments.—Woolworth is engaged in the retail merchandising business. It has chain stores located throughout the United States and has its commercial domicile in New York.[209] Of relevance to this case, Woolworth received dividends from four foreign subsidiaries, all of which are similarly engaged in chain store retail merchandising.[210] Three of the payors are wholly-owned and the fourth is a publicly held British corporation in which Woolworth has a 52.7% interest.[211] Woolworth elected all of the directors of the wholly owned subsidiaries.[212]

The taxing state, New Mexico, adopted the UDITPA[213] and is a member of the Compact.[214] Pursuant to its statute, the state divided corporate income between business income,[215] to which it applied its

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[205]102 S. Ct. at 3116 n.24.

[206]*Id.* at 3114 n.22.

[207]102 S. Ct. 3128 (1982).

[208]*Id.* at 3139.

[209]*Id.* at 3131.

[210]*Id.* Together, the four foreign subsidiaries paid Woolworth approximately $39.9 million in dividends.

[211]*Id.*

[212]*Id.* at 3134.

[213]For a discussion of the UDITPA, see *supra* notes 51, 55-60 and accompanying text.

[214]102 S. Ct. at 3134. For a discussion of the Multistate Tax Compact, see *supra* notes 61-66 and accompanying text.

[215]"'[B]usiness income' means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." N.M. STAT. ANN. § 7-4-2(A) (1981).

apportionment formula, and nonbusiness income,[216] which was generally allocated on the basis of commercial domicile to a single state.[217] Woolworth reported its foreign-source dividend income as nonbusiness income, none of which was allocated to New Mexico.[218]

On audit, the state determined that Woolworth should have included its foreign-source dividend income as apportionable business income.[219] The New Mexico Supreme Court found that the dividend income from the subsidiaries met the statutory test for inclusion as apportionable income[220] and held that the dividends were income earned in a unitary business.[221] The United States Supreme Court reversed.[222]

2. The Unitary Business Limitation on the State Taxation of Foreign-Source Dividend Income.—The United States Supreme Court acknowledged that Woolworth had the potential to operate its subsidiaries as a single, unitary business; however, the Court found that the New Mexico Supreme Court wrongfully resolved the constitutional issue before it by relying too heavily on the potential ability to operate the foreign subsidiaries as part of a unitary relationship, rather than making its determination with reference to the actual operation of the corporation. The Court made it clear that the potential ability to operate a corporation as part of a unitary business is not the controlling criterion when the dividend income is in fact derived from a discrete business enterprise.[223] For a state properly to impose a tax on the foreign income, the Supreme Court held that the corporation must be operated as an integrated enterprise in fact.[224] The Court then emphasized the factors which produce substantial mutual interdependence, enumerated in *Mobil*, as relevant to the state taxation of foreign-source dividend income, namely: whether the activities in the taxing state contributed to the income of the subsidiaries as a result of functional integration, centralization of management, and the achievement of other economies of scale arising from the operation of the business as a whole. If these factors do exist, then this evidence of a unitary business may provide the state with the jurisdiction of foreign-source dividend income, namely: whether the activities other connections with that state.[225]

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[216] "'[N]onbusiness income' means all income other than business income." *Id.* at § 7-4-2(D).

[217] 102 S. Ct. at 3131-32.

[218] *Id.* at 3132.

[219] *Id.*

[220] *Id.* at 3133. *See* Taxation & Revenue Dep't v. F. W. Woolworth Co., 95 N.M. 519, 624 P.2d 28 (1981).

[221] 102 S. Ct. at 3133.

[222] *Id.* at 3140.

[223] *Id.* at 3134.

[224] *Id.*

[225] *Id.* at 3135.

The Court turned to a consideration of the extent to which these factors were present in the case and made the threshold determination that there existed little in the way of functional integration.[226] The Court distinguished the business of retail merchandising from the integrated multinational business of producing, processing, and marketing a resource on a worldwide basis which involves a flow of international trade, exchanges of personnel, and substantial mutual interdependence.[227] The Court referred to this as a "critical distinction"[228] and consistent with this distinction the evidence in the case was found to show that no phase of any subsidiary's business was an integrated operation together with the parent corporation.[229] Each subsidiary performed independently of the parent corporation in its ordinary course of business.[230] The parent corporation neither provided essential corporate services for the subsidiaries nor engaged in any centralized purchasing, manufacturing, or warehousing of merchandise.[231] Each subsidiary obtained financing from sources other than the parent. The record persuaded the Court that, in fact, there existed no functional integration.[232]

Next, the Court considered the extent to which there was centralized management or economies of scale. Management decentralization was reflected in the fact that there was no interchange of personnel, no central training program, and each subsidiary was independent and autonomous in operations and policies with regard to retailing.[233] The management of the foreign subsidiaries had complete control over the business decisions affecting their operations. The Court deemed it important that none of the parent corporation's departments was devoted to overseeing the operations of the

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[226] *Id.*

[227] *Id.* at 3135, 3139.

[228] The Court explained:

> There is a critical distinction between a retail merchandising business as conducted by Woolworth and the type of multinational business—now so familiar—in which refined, processed, or manufactured products (or parts thereof) may be produced in one or more countries and marketed in various countries, often worldwide. In operations of this character there is a flow of international trade, often an interchange of personnel, and substantial mutual interdependence. The uncontradicted evidence demonstrates that Woolworth's international retail business is not comparable. There is no flow of international business. Nor is there any integration or unitary operation in the sense in which our cases consistently have used these terms.

Id. at 3138-39 (footnote omitted).

[229] *Id.* at 3135.

[230] *Id.*

[231] *Id.* at 3135-36.

[232] *Id.* at 3136.

[233] *Id.* at 3136-37.

subsidiaries.[234] The personnel departments of Woolworth's foreign subsidiaries were fully independent operations, dedicated to recruiting and training nationals to fill positions at every level of the business. In sum, it appeared to the Court that each subsidiary operated as a distinct business enterprise at the level of full-time management.[235]

The Court did find that there was some centralizaton of management. The parent corporation maintained common directors with some of the subsidiaries.[236] There were frequent contacts in upper management.[237] Major financial decisions, such as the distribution of dividends and the creation of substantial indebtedness, were subject to the parent corporation's approval.[238] Woolworth published consolidated financial statements other than for tax purposes.[239] However, the operations of the parent company were so unrelated to the operations of its subsidiaries that the stable operation of one corporation was not important to another's full utilization of capacity.[240]

The Court, therefore, emphasized that the overriding finding of fact was that "[e]xcept for the type of occasional oversight—with respect to capital structure, major debt, and dividends—that any parent gives to an investment in a subsidiary, there [was] little or no integration of the business activities or centralization of the management of [the subsidiaries]."[241] On the basis of these facts, the Court concluded that the corporations involved in *Woolworth* were not part of a unitary business.[242] Moreover, the apportionment of the foreign-source dividend income did not bear the necessary relationship to benefits afforded by the taxing state because New Mexico attempted to reach extraterritorial values wholly unrelated to the business of the parent corporation's retailing activities within that state.[243]

3. Federal Tax Policy and the State Taxation of Foreign-Source Dividends Deemed Received: Gross-Up.—The rationale and analysis used by the Court in the resolution of the first issue carried over to determine a similar result with respect to a second issue in *Woolworth* by which the state had attempted to broaden the income base subject to state taxation. The Court's decision on the second issue

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[234]*Id.* at 3137.

[235]*Id.* at 3139.

[236]*Id.* at 3137.

[237]*Id.*

[238]*Id.*

[239]*Id.* at 3137-38. Neither the parent corporation nor any of the foreign subsidiaries consolidated its federal tax return with any of the other corporations. *Id.* at 3137.

[240]*Id.* at 3138.

[241]*Id.*

[242]*Id.*

[243]*Id.* at 3139.

spanned a mere paragraph of the opinion, but the approach taken is illustrative of the importance to be attached to the unitary business limitation as the primary hurdle which any state must surpass in order to include vast amounts of other forms of foreign-source income within apportionable income. New Mexico had reached out to include within Woolworth's apportionable income an amount known as "gross-up," which attempt, for the reasons already expressed, the Court summarily held to contravene the due process clause.[244] In order to better appreciate this result, it is helpful to briefly and generally describe the federal tax concept of "gross-up" and its characterization for state tax purposes by both the corporation and the state.

In the allocation of income of a multinational group of corporations, the posture of the federal tax system is unlike that of the states in its recognition of the separate source of income earned in the United States as distinguished from income earned in foreign nations.[245] A member of a multinational group of related corporations is treated as if it were an independent corporation, the income of which is subject to taxation in the nations in which it has its operations. The taxable income of a domestic corporation, which is a member of such an affiliated group, is determined on the basis of elaborate separate geographical and transactional accounting rules, that is, by means of separately determining the income realized and the expenses incurred on the books of that corporation.[246]

Pursuant to this method, if the parent corporation of such a related group of multinational corporations is a domestic corporation, the taxable income of the parent corporation is for most purposes determined without regard to the income of its foreign affiliates and subsidiaries.[247]

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[244]*Id.*

[245]3 B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 70.1 (1981); P. POSTLEWAITE, INTERNATIONAL CORPORATE TAXATION §§ 1.01, 1.03 (1980).

[246]B. BITTKER & J. EUSTICE, FEDERAL INCOME TAXATION OF CORPORATION AND SHAREHOLDERS ¶ 15.06 (4th ed. 1979). The United States Internal Revenue Service is authorized to monitor transactions and to reallocate any income, deduction, or other item which affects taxable income among domestic corporations and their foreign subsidiaries and affiliates and, if reallocation is required, to determine the taxable income of each corporation. *See* I.R.C. § 482 (1976). Thus, the federal tax system is based on a separate accounting approach. *See generally*, G.A.O. REPORT–IRS, *supra* note 4; Note, *Multinational Corporations and Income Allocation Under Section 482 of the Internal Revenue Code*, 89 HARV. L. REV. 1202 (1976).

[247]In conjunction with the separate acounting rules are the source rules for the determination of the extent to which items of income are to be characterized as derived from domestic sources or from foreign sources. P. POSTLEWAITE, *supra* note 245, at §§ 2.01-2.27. Another mechanism exists for calculating the amount of foreign-source income. I.R.C. §§ 861-864 (1976 & West Supp. V 1981). The qualified separate accounting approach is incorporated in the model convention proposed by the Organization for Economic Cooperation and Development (OECD) of which there are 24 members, including the United States. *See* OECD Model Convention, 1 TAX TREATIES (CCH) ¶ 151. The United States Treasury Department's Model Income Tax Treaty also adopts the

Federal taxation of the income of the foreign subsidiaries is deferred until the parent corporation receives a dividend or is deemed to receive a dividend from the subsidiaries.[248] Double taxation is avoided by granting to domestic corporations credits against income taxes paid to foreign governments on the earnings which constitute the dividends from the subsidiaries to the parent corporations.[249] The qualified separate accounting approach, domestic income tax deferral, and credits against other income taxes may be the three basic principles of the federal system with respect to the taxation of the income of related corporations.[250]

The allowance of a tax credit for inter-corporate dividends among such related corporations is an important mechanism in the federal tax system. In some cases, foreign tax credits may be the combination of foreign income taxes actually paid by the domestic corporation and those taxes which are deemed paid by statutory formula as well.[251] Under the statutory scheme of the Internal Revenue Code, section 901 authorizes the election to take a credit for foreign income

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qualified separate accounting approach and resembles the OECD Model Convention. *See* Model Income Tax Treaty, 1 TAX TREATIES (CCH) ¶ 158 (June 16, 1981).

[248]G. HUFBAUER & D. FOSTER, U.S. TAXATION OF THE UNDISTRIBUTED INCOME OF CONTROLLED FOREIGN CORPORATIONS 1-63 (Tax Policy Research Study No. 3, Essays in International Taxation: 1976, 1976). Exceptions to deferral are found in I.R.C. §§ 951-964 (West 1982 & West Supp. 1983) (shareholders currently taxed on income of a controlled foreign corporation in certain situations), and in I.R.C. §§ 551-558 (1976) (foreign personal holding companies).

[249]I.R.C. §§ 901-904 (West 1982 & West Supp. 1983). For a lengthy analysis of the foreign tax credit, see E. OWENS, THE FOREIGN TAX CREDIT (1961). For a more concise explanation, see Dale, *The Reformed Foreign Tax Credit: A Path Through the Maze*, 33 TAX L. REV. 175 (1978). *See also Ad Hoc Committee on Foreign Tax Credit, ABA Tax Section, Comments Regarding Proposed Foreign Tax Credit Regulations*, 33 TAX LAW. 35 (1979). The rationale of the foreign tax credit was explained as follows:

> [The] foreign tax credit system embodies the principle that the country in which a business activity is conducted (or in which any income is earned) has the first right to tax the income arising from activities in that country, even though the activities are conducted by corporations or individuals resident in other countries. Under this principle, the home country of the individual or corporation has a residual right to tax income arising from these activities, but recognizes the obligation to insure that double taxation does not result. Some countries avoid double taxation by exempting foreign source income from tax altogether. For U.S. taxpayers, however, the foreign tax-credit system, providing a dollar-for-dollar credit against U.S. tax liability for income taxes paid to a foreign country, is the mechanism by which double taxation is avoided.

Joint Committee on Taxation 234, 1976-3 C.B. 246; *see* Surrey, *Current Issues in the Taxation of Corporate Foreign Investment*, 56 COLUM. L. REV. 815 (1956).

[250]Surrey, *Reflections on the Allocation of Income and Expenses Among National Tax Jurisdictions*, 10 LAW & POL'Y IN INT'L BUS. 409, 415-16 (1978); *see also* G.A.O. REPORT-1982, *supra* note 3, at 32; Hellerstein, *supra* note 71, at 162-63.

[251]B. BITTKER, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 69.2.1 (1981).

taxes.[252] Section 901(a) provides for a credit for taxes deemed to have been paid pursuant to section 902. Under section 902(a), a domestic corporation which has received a dividend from a foreign subsidiary will be deemed to have paid any foreign taxes paid by the foreign subsidiary with respect to the earnings from which the dividend is distributed.[253] This credit may be computed by multiplying the foreign taxes of the subsidiary by a fraction which consists of dividends received over the after-tax profits of the foreign subsidiary.[254]

If a domestic corporation elects to take advantage of this foreign tax credit, then Internal Revenue Code section 78 requires that the domestic corporation include in gross income an amount equal to the deemed-paid tax credit computed pursuant to section 902(a), which amount is to be treated as a dividend received by the domestic corporation in addition to the amount of the dividend actually received from the foreign subsidiary.[255] This procedure with respect to the augmentation of foreign-source dividend income is commonly referred to as "gross-up".[256] Although the amount of gross-up is never ac-

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[252]Geen & Schreyer, *Foreign Tax Credit-Qualification and Computation*, 5-4th TAX MGMT. A-3 (1979).

[253]*See generally*, R. RHOADES, INCOME TAXATION OF FOREIGN RELATED TRANSACTIONS § 5.06[2] (1982); E. OWENS & G. BALL, THE INDIRECT CREDIT (1976). The amount of taxes deemed paid by the domestic corporation is the proportion of the foreign taxes on accumulated profits which the amount of the dividend bears to the accumulated profits in excess of the foreign taxes. Geen & Schreyer, *supra* note 252, at A-31 to A-32. The "accumulated profits" of the foreign subsidiary are the pre-tax profits without reduction for the foreign taxes. I.R.C. § 902(c)(1) (1976); Treas. Regs. §§ 1.902-1(e), 1.902-1(f) (1980). *See* Schoenfeld, *Some Definitional Problems in the Deemed Paid Foreign Tax Credit of Section 902: "Dividends" and "Accumulated Profits"*, 18 TAX L. REV. 401 (1963); *see also* Rev. Rul. 71-65, 1971-1 C.B. 212 (treatment of dividends in kind for purposes of the § 902 credit computations).

[254]B. BITTKER & J. EUSTICE, *supra* note 246, at ¶ 17.11. *See* Geen & Schrever, *supra* note 252, at A-32. In American Chicle Co. v. United States, 316 U.S. 450 (1942), the Court held that for purposes of computing the credit, "accumulated profits" of the foreign subsidiary were to be defined as the foreign subsidiary's total pre-tax profits less the foreign income taxes. For a description of this outdated approach, see R. RHOADES, *supra* note 253, at §§ 5.06[4]-[5]. The *American Chicle* rule was criticized because it did not avoid the allowance of what would otherwise amount to both a deduction and a credit for the foreign taxes. This led to the enactment of the gross-up provision. *See* I.R.C. § 78 (1976); Geen & Schreyer, *supra* note 252, at A-31 to A-32.

[255]The tax base for the domestic corporation is the actual dividend plus the dividend deemed received under I.R.C. § 78 (1976). *See* R. RHOADES, *supra* note 253, § 5.06[7], at 5-142 & n.86. Under Proposed Regulations § 1.902-3(d)(1)(ii), the dividend deemed received is treated as being received by the parent corporation from the same foreign subsidiary as was the actual dividend. *Id.* The § 78 dividend is treated as a dividend for practically all purposes of the Internal Revenue Code. *Id.* § 5.06[7].

[256]For a thorough description of the concept of "gross-up," see R. RHOADES, *supra* note 53, at § 5.06[7], together with other related sections contained in the text in connection therewith; *see also* B. BITTKER, *supra* note 251, at ¶ 69.2. *Woolworth* provided

tually received, it is deemed as having been received by the domestic corporation from the foreign subsidiaries for purposes of claiming the foreign tax credit.[257]

The second issue raised in *Woolworth* concerned the apportionment of the gross-up dividend income deemed received by the parent corporation from its foreign subsidiaries.[258] Woolworth did not report the federal gross-up amount as New Mexico business income.[259] On audit, the state took the position that gross-up is business income subject to apportionment.[260] The state court of appeals disagreed with the characterization of gross-up as business income and excluded the amount from apportionable income.[261] The New Mexico Supreme Court rejected the corporation's constitutional challenges to the inclusion of the gross-up amount in apportionable income[262] and also rejected the corporation's contention that the apportionment formula should be adjusted if the dividend income were found to be apportionable.[263]

The United States Supreme Court determined that the foreign tax credit of Woolworth related to the taxation by foreign countries

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the following example illustrating the foregoing methods:

> "If a foreign subsidary of a United States parent earns $100, pays foreign tax of $40, and pays a dividend of $30 out of its after-tax profits of $60 the deemed paid foreign tax credit of the parent under section 902(a) is 30/60 X $40, or $20. The parent includes $50 in dividend income (*i.e.*, the actual dividend of $30 plus $20 of "gross-up") and claims a foreign tax credit of $20 against the federal income tax on this income."

Woolworth, 102 S. Ct. at 3132 n.6. Another good example may be found at Geen & Schreyer, *supra* note 252, at A-32.

[257]*Woolworth*, 102 S. Ct. at 3132. The Court reasoned that the "gross-up computation is a figure that the Federal Government 'deems' Woolworth to have received for purposes of part of Woolworth's federal foreign tax credit calculation." *Id.* at 3139. The Court looked to the legislative intent in its analysis. *Id.* A possible inference from this reasoning is that gross-up may not be construed to be a dividend for state tax purposes in any event.

[258]This issue had been raised earlier in Vermont by Woolworth. F. W. Woolworth Co. v. Comm'r of Taxes, 133 Vt. 93, 328 A.2d 402 (1974); F. W. Woolworth Co. v. Comm'r of Taxes, 130 Vt. 544, 298 A.2d 839 (1972); *see also, Mobil*, 445 U.S. at 433 n.9 (the gross-up issue was not considered by the Court).

[259]The magnitude of the item of gross-up and the substantial effect of its inclusion in apportionable income is illustrated by this case. Woolworth calculated $25.5 million of gross-up. This figure, together with the $39.9 million in actual dividends from Woolworth's four subsidiaries and a $1.6 million foreign exchange gain, increased the parent corporation's apportionable income from $86,622 to $401,518. 102 S. Ct. at 3132.

[260]*Id.* The State of New Mexico does not permit a deemed-paid tax credit or other credit similar to the federal tax credit. In fact, no states grant a credit similar to the federal tax credit and most states do not allow a deduction so as to avoid any resultant double taxation. *See* G.A.O. REPORT-1982, *supra* note 3, at 41.

[261]F. W. Woolworth Co. v. Bureau of Revenue, 95 N.M. 542, 543-44, 624 P.2d 51, 52-53 (N.M. Ct. App. 1979), *rev'd*, 95 N.M. 519, 624 P.2d 28 (N.M. 1981).

[262]102 S. Ct. at 3133-34.

[263]*Id.* at 3134 n.9.

of the parent corporation's foreign subsidiaries, each of which operated a discrete business enterprise. Therefore, the attempt by the state to tax this gross-up was unconstitutional, especially since New Mexico contributed nothing to the activities of the foreign subsidiaries.[264] Nevertheless, it remains somewhat uncertain whether gross-up income deemed received for federal foreign tax credit purposes may be apportionable income for state tax purposes in the case of a unitary business relationship where a state has a deemed-paid foreign tax credit similar to the federal rules. Further, a question may still remain as to whether the parent corporation's state of commercial domicile may treat the entire gross-up figure as dividends deemed received for its state tax purposes.

C. Summary Comment on ASARCO *and* Woolworth

The contribution of *Woolworth* and *ASARCO* is the recognition of the extent to which the existence of a substantial mutual interdependence between the parent corporation and its foreign subsidiaries plays in determining whether due process considerations prohibit the state taxation of foreign-source income. The Supreme Court, in *ASARCO* and *Woolworth*, examined the way in which the corporate enterprises were structured and operated, employed sound economic analysis in discerning the relationship of the enterprise with the taxing state, and adopted identifiable criteria for the determination of whether an enterprise is unitary. The Court has established the rule that a nondomiciliary taxing state cannot subject foreign-source income to an apportionment formula unless the parent corporation and its foreign subsidiaries foster such substantial mutual interdependence that they constitute a unitary business under the criteria reiterated by the Court. It would not be fair to render the application of formula apportionment to the receipt of income arising out of mere passive investments, such as those in *ASARCO*, or in connection with distinct business operations, such as those in *Woolworth*. Nevertheless, there remain questions as to the relative importance of each of the constituent criteria used to define the unitary business relationship and as to the importance of the matrix of facts and assumptions which may relate to these criteria.

ASARCO had argued that functional integration between a payor subsidiary and a recipient parent corporation should be the "bright line" criteria for a nondomicilary state's application of formula apportionment to the income received by that parent corporation from the subsidiary.[265] In the past, however, the Court had upheld the applica-

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[264]*Id.* at 3139.

[265]*See* Brief for Appellant at 13, *ASARCO*, 102 S. Ct. 3103.

tion of the unitary business/formula apportionment method not only to vertically integrated enterprises but also to a series of vertically integrated enterprises which operated separately in several different jurisdictions and which were linked by managerial or operational resources that resulted in a sharing or exchange of value and other economies of scale among the enterprises.[266] Substantial mutual interdependence, then, may exist among related corporations in the absence of a vertically integrated enterprise and, as such, render the related corporate group a unitary business. In *ASARCO* and *Woolworth*, the Court determined that a unitary business relationship did not exist where there was neither functional integration nor substantial mutual interdependence among related corporations. Although the *ASARCO* and *Woolworth* decisions set forth and reaffirm some important taxation principles, their holdings are necessarily limited to the Court's rigorous examination of the facts presented in each case. The decisions seemed to be decided primarily upon the factual record rather than upon innovations in the legal principles of state corporate income taxation.

A description of the relationship between Woolworth and its foreign subsidiaries provides a useful factual paradigm with respect to which a corporate taxpayer may look for guidance to determine whether dividend income or other types or forms of income from its subsidiaries are derived from unrelated business activities. The fact that the foreign subsidiaries engaged in essentially the same business as the parent corporation, that major financial decisions of the subsidiaries were subject to the approval of the parent corporation, that there existed interlocking directorates, and that there were exchanges of information and the potential for control in which all of these factors may result did not by themselves warrant characterization as a unitary business. The operations of the foreign subsidiaries were decentralized to such an extent that the activities of each within each particular country were so integrated and self-sustaining as to be separate and apart from the operations of the parent corporation.[267] There was seemingly no transfer of products between the parent corporation and its subsidiaries, and the personnel departments of the foreign subsidiaries were independent operations.[268] Thus, "*no* phase of any subsidiary's business was integrated with the parent's."[269]

Woolworth and *ASARCO* could have been read to stand for the

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[266]Butler Bros. v. McColgan, 315 U.S. 501 (1942). *See supra* notes 108-16 and accompanying text, *See* Container Corp. of America v. Franchise Tax Board, 103 S. Ct. 2933, 2941 (1983).

[267]*Woolworth*, 102 S. Ct. at 3135-36.

[268]*Id.*

[269]*Id.* at 3135.

proposition that, in the case of a group of related domestic and foreign corporations which is not vertically integrated, a finding of a unitary business would be impermissible without a flow of international trade among the related corporations. As we have seen, prior decisions of the Court which involved unitary apportionment within the domestic context had been cases in which there had been a substantial flow of goods and services among vertically integrated entities.[270] In the most recent decision of the Supreme Court, however, this point was further clarified by stating that the degree of substantial mutual interdependence necessary to justify taxation can arise in a number of different ways. The important criteria is that there be a sharing or exchange of value, not simply a flow of trade.

VII. State Taxation of the Worldwide Combined Income of a Multinational Enterprise: *Container*

Container Corp. of America v. Franchise Tax Board[271] is the first decision of the United States Supreme Court to address the constitutional considerations arising out of the application of worldwide combined reporting to the income of a domestic corporation and its foreign subsidiaries. As we have already noted,[272] however, the concepts of "unitary business" and "formulary apportionment" play a central role in the combined reporting scenario. So in this fundamental sense the application of combined apportionment to a worldwide enterprise does not differ radically from the approach taken by the states in previous cases before the Court; rather, it is logically consistent with the unitary business/formula apportionment approach.[273] One of the distinguishing features of this form of apportionment is the composition of taxable income. Generally speaking, instead of including foreign-source income such as dividends from the subsidiaries in the parent corporation's apportionable tax base, combined reporting includes the income realized from the operations of the foreign subsidiaries themselves, and excludes intercorporate dividends so as to avoid double inclusion of that income in the corporation's tax base.[274] Another distinguishing characteristic of combined reporting, which necessarily parallels the composition of taxable income, is in the taxing state's calculation of its apportionable share of the net income of the related

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[270]*See, e.g.*, Exxon Corp. v. Dep't of Revenue, 447 U.S. 207 (1980) (continuous product flow in domestic context constituted unitary enterprise where it was a highly integrated business); Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) (integrated manufacturing and distribution of feeds).

[271]103 S. Ct. 2933 (1983).

[272]*See supra* notes 67-71 and accompanying text.

[273]103 S. Ct. at 2941.

[274]*Id.* at 2942 n.5.

domestic and foreign corporations. The standard three-factor apportionment formula includes the property, payroll, and sales of the foreign subsidiaries. Irrespective of these formal variations, one might easily infer that the due process and foreign commerce clauses were once again invoked and applied to the facts of this case.

A. Background of the Case

Container was engaged in the production and distribution of paperboard packaging. The operation of the corporation was vertically integrated and largely domestic.[275] Container controlled several wholly-owned and partially-owned overseas subsidiaries.[276] In most instances, the subsidiaries were fully integrated and were engaged in essentially the same line of business as the domestic corporation in their local markets. The subsidiaries purchased only small amounts of materials from the domestic corporation.[277] Although day-to-day management and personnel matters were handled by the subsidiaries, the domestic corporation had five persons assigned to overseeing the subsidiaries' operations.[278] Those officers addressed long-term decisions and prescribed profitability and ethical standards.[279] Container held or guaranteed much of the long-term debt of the subsidiaries, provided advice in several areas, and occasionally aided in the acquisition of equipment.[280]

Container was doing business in California which had a corporate franchise tax geared to income.[281] The corporation initially calculated its tax liability to the state based on an apportioned share of its net income without regard to any income attributable to the foreign subsidiaries.[282] The state insisted that the corporation should have characterized its foreign subsidiaries as part of a unitary enterprise

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[275]*Id.* at 2943.

[276]Container's ownership interest in the subsidiaries ranged between 66.7% and 100%. *Id.*

[277]Such transactions amounted to approximately one percent of the subsidiaries' total purchases. *Id.*

[278]*Id.* at 2943-44.

[279]*Id.* at 2944.

[280]*Id.*

[281]The California tax statute at issue was in large measure similar to most of the statutes discussed earlier in this article. The statute derived most of its relevant provisions from the UDITPA. *See supra* notes 51-60 and accompanying text. The apportionment formula which California adopted was the standard three-factor formula. *See supra* note 50. California's corporate franchise tax was measured by net income. The California method of apportionment is explained in Keesling & Warren, *The Unitary Concept in the Allocation of Income*, 12 HASTINGS L.J. 42, 43 (1960).

[282]103 S. Ct. at 2944. Container also deducted all dividends and other non-business income as authorized by state law. *Id.* at 2945.

and not merely as passive investments.[283] The state's calculations increased the corporation's tax liability.[284] Container commenced a refund action, the parties submitted the case to the trial court on stipulated facts, and the court upheld the additional assessment. The state court of appeals affirmed, finding that Container and its overseas subsidiaries constituted a unitary enterprise, and the California Supreme Court declined review.[285]

In the United States Supreme Court, Container challenged the taxation of the worldwide combined income of the multinational corporate group on three major grounds.[286] First, the nondomiciliary state was precluded from the application of combined apportionment because the domestic corporation and its subsidiaries and affiliates operating abroad do not constitute a unitary enterprise for tax purposes. Second, the three-factor combined apportionment formula used by the state misapportions income to the domestic corporation thereby resulting in extraterritorial taxation in contravention of the due process requirement of fair apportionment. Third, worldwide combined reporting is inconsistent with the qualified separate accounting approach used by the federal government and other foreign governments and results in multiple taxation which impairs federal uniformity thereby violating the foreign commerce clause.

B. Due Process Considerations

1. The Propriety of the Unitary Business Determination.—On the threshold issue, the Court concluded that the state properly applied the unitary business principle to the multinational corporate group. In reaching this conclusion, the Court stated that it would, "if reasonably possible, defer to the judgment of the state courts in deciding whether a particular set of activities constitutes a 'unitary business.' "[287] The Court declared that since the constitutional limitations on the unitary business principle are well-established and the factual records in the cases tend to be long and complex, the role of the Court is not to engage in de novo adjudications, but rather "to determine whether the state court applied the correct standards to the case; and if it did, whether its judgment 'was within the realm of permissible judgment.' "[288]

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[283]*Id.* at 2945. California's unitary treatment of multi-corporate enterprises is discussed in Keesling & Warren, *supra* note 281, at 57.

[284]See 103 S. Ct. at 2945 n.11 for a detailed accounting and explanation of the net effect of the adjustments on the corporation's tax liability.

[285]*Id.* at 2945.

[286]*Id.* at 2939.

[287]*Id.* at 2945.

[288]*Id.* at 2946 (quoting Norton Co. v. Dep't of Revenue, 340 U.S. 534, 538 (1951)). The Court noted that the approach which it previously used in *ASARCO* and *Woolworth* is consistent with this standard of review. 103 S. Ct. at 2946 n.15. In *ASARCO* the

Container made three claims that the state court was incorrect in its particular application of the legal principles. First, Container claimed that the state court, like the state court in *Woolworth*, erred in its reliance upon the corporation's potential ability to control the operations of the foreign subsidiaries.[289] The Supreme Court disagreed, finding that the state court had relied principally on the fact that certain officers of the parent corporation established standards of compliance for the subsidiaries.[290] The Court noted that even though the potential ability to control a subsidiary is not a dispositive factor in finding a unitary business, it is a relevant factor.[291] Second, Container argued that the state court incorrectly relied on a presumption that related corporations engaged in the same business are unitary. Because this presumption was only one factor among many considered by the state court, the Supreme Court found its limited use reasonable. The Court reasoned that when related corporations are engaged in essentially the same line of business, these activities increase the probability of better utilization of existing business resources through operational integration or economies of scale.[292] Third, Container argued that a substantial flow of goods between the parent corporation and its subsidiaries should be a prerequisite to a determination of a unitary business. While such a test may be sensible as an administrative policy matter, the Court could perceive of no reason to impose the test on the states as a constitutional requirement.[293] The Court stated that the constitutional requirement for finding a unitary business is not a substantial flow of goods, but a more wide-ranging flow of value which results from "functional integration, centralization of management, and economies of scale."[294] Although a substantial flow of goods is one of the means in which substantial mutual interdependence among related corporations can result, it is not the sole means.[295]

The state court's judgment that the multinational corporate group constituted a worldwide unitary enterprise was guided by several factors.[296] Two of those factors were given special attention by the Court.[297] First, there existed a flow of capital resources through substantial loans and guarantees from the parent corporation to the

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Court relied on factual findings made by the state courts that a unitary business finding was impermissible. *Id.* The Court in *Woolworth* examined the evidence and concluded that the state court made critical errors in both the conclusions it drew and the legal principles it applied. *Id.*

[289] *See supra* text accompanying note 223.

[290] 103 S. Ct. at 2946.

[291] *Id.* at 2946 n.16.

[292] *Id.* at 2947.

[293] *Id.* at 2947 n.17.

[294] *Id.* at 2947 (quoting *Woolworth*, 102 S. Ct. at 3135 (quoting *Mobil*, 445 U.S. at 438)).

[295] 103 S. Ct. at 2947.

[296] *Id.* at 2947-48.

[297] *Id.* at 2948 n.19.

subsidiaries which resulted in a flow of value.[298] The Court pointed out that those capital transactions served an operational function and not merely an investment function.[299] Second, the parent corporation played a managerial role in the affairs of its subsidiaries which was "grounded in its own operational expertise and its overall operational strategy."[300] Even though day-to-day management of the subsidiaries was handled by local executives,[301] the Court noted that merely decentralizing the everyday management responsibilities would not prevent the finding of unitary business.[302] Based on these factors, the Court found that *Container* came closer to presenting a functionally integrated enterprise than either *ASARCO* or *Woolworth*.[303] These factors, taken in combination, convinced the Supreme Court that the state court reached a conclusion within the realm of permissible judgment, and, therefore, the state was entitled to tax the multinational corporate group as a single unitary entity.[304]

2. The Fairness of the Apportionment Formula.—The Constitution requires that the state apply a fair formula which apportions the income of the business, if the state determines that a particular set of activities produces a unitary enterprise.[305] Container challenged the application of the standard three-factor apportionment formula to the foreign operations of its subsidiaries, claiming that a disproportionate result occurred because the foreign operations were significantly more profitable than the domestic operations of the parent corporation.[306] This, claimed Container, resulted in the allocation of an inflated amount of income to its apportionable tax base.[307] Container maintained that this result was compounded by the fact that wage rates, one of the three factors of the formula, were substantially lower in their foreign

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[298]Approximately half of the long term debt of the subsidiaries was either held directly or guaranteed by the parent corporation. *Id.* at 2944. There was no indication that the loans and guarantees were conducted at arm's length and it is likely that they were part of an effort to ensure multinational corporate expansion and integration. *Id.* at 2948 n.19. Also, capital expenditures of the subsidiaries were subject to the approval of the parent corporation. *Id.* at 2944.

[299]*Id.* at 2948 n.19. *Cf.* Hellerstein, *State Income Taxation of Multijurisdictional Corporations, Part II: Reflections on* ASARCO *and* Woolworth, 81 MICH. L. REV. 157, 180-83 (1982) (income from transactions in capital investments which are integrally related to the taxpayer's business activities in the taxing state should be appropriate for inclusion in the recipient's apportionable tax base).

[300]103 S. Ct. at 2948 n.19.

[301]*Id.* at 2943-44.

[302]*Id.* at 2948 n.19 (citing Exxon Corp. v. Dep't of Revenue, 447 U.S. 207, 224 (1980)).

[303]103 S. Ct. at 2947-48.

[304]*Id.* at 2948.

[305]*Id.* at 2942. *See supra* text accompanying notes 24-27, 44, 47.

[306]103 S. Ct. at 2948.

[307]*Id.* at 2949.

operations.[308] As a result, the income earned on the books of foreign subsidiaries which have lower production costs and greater profitability is apportioned to the taxable income of domestic corporations which have higher production costs or lesser profitability.[309] As evidence in support of this argument, Container presented various statistical data comparing wage rates, productivity, and profitability in domestic operations with foreign operations in the multinational corporate group.[310]

The Supreme Court held that the application of the standard three-factor apportionment formula to the combined income of the multinational corporate group was fair because Container had failed to demonstrate that the income attributed to the taxing state was "out of all appropriate proportion to the business transacted in that State."[311] Container's argument and its supporting evidence were predicated on a variation of separate geographical accounting. The Court restated that separate geographical accounting suffers from weaknesses that justify the use of formula apportionment, including the potential failure to "account for contributions to income resulting from functional integration, centralization of management, and economies of scale."[312]

Although the three-factor formula is necessarily imperfect, the Court found it consistent in the sense that the payroll, property, and sales factors taken in combination appear to reflect a large share of income-generating activities.[313] There is a substantial margin of error inherent in any method which attributes income among the components of a unitary enterprise. The Court concluded that Container had failed to demonstrate that the margin of error inherent in the three-factor apportionment formula was significantly greater than the margin of error inherent in the formal geographical or transactional accounting method.[314]

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[308] *Id.*

[309] This effect of combined reporting is illustrated by the following simplified example. *P* corporation has a domestic operation solely within the taxing state. Its foreign subsidiary, *S* corporation, operates solely in another country. Assuming that both corporations have equal payroll, property, and sales, combined apportionment would combine the total income of both corporations and apportion 50% of the combined income to each corporation. The same analysis would apply where *S* corporation realized earnings of $10 million and *P* corporation incurred an operating loss of $5 million. In this situation the taxing state would apportion $2,500,000 of income to *P* corporation and impose a tax on that income.

[310] 103 S. Ct. at 2949.

[311] *Id.* at 2948 (quoting Hans Rees' Sons, Inc. v. North Carolina *ex rel.* Maxwell, 283 U.S. 123, 135 (1931)).

[312] 103 S. Ct. at 2948-49 (quoting *Mobil*, 445 U.S. at 438).

[313] 103 S. Ct. at 2949.

[314] *Id.* at 2949-50. The statistical evidence presented by Container demonstrated that the income taxable under the separate accounting method was 14% less than the combined apportionment method, a "far cry" from the 250% difference present in Hans Rees' Sons, Inc. v. North Carolina *ex rel.* Maxwell, 283 U.S. 123 (1931). 103 S. Ct. at 2950.

C. *Foreign Commerce Considerations*

The separate accounting method for taxing domestic owned enterprises operating abroad is the method used by the federal government and is the internationally accepted standard.[315] Under this method, related foreign and domestic corporations are treated as if they are separate and independent entities dealing with each other at arm's length.[316] Container argued that the commerce clause compelled California to utilize that separate accounting, arm's-length method in determining the corporation's tax obligations.[317] Because the domestic corporation and its subsidiaries formed an international unitary business, the Court analyzed the state tax under the two additional commerce clause considerations announced in *Japan Line, Ltd. v. County of Los Angeles*.[318] The Court examined, first, whether the tax increases the risk of multiple taxation and, second, whether the tax interferes with needed federal uniformity.

The Court acknowledged that actual double taxation resulted under the facts in *Container*, but found that double taxation is not inevitable in all cases involving the simultaneous use of worldwide unitary apportionment and arm's-length allocation.[319] Furthermore, because there are substantial differences among the allocation rules applied by the various taxing jursidictions which have adopted the arm's-length approach, compelling the state to adopt that approach would not necessarily avoid double taxation.[320] The Court was unwilling to require the state to adopt one allocation method over another where double taxation was a possibility under both.[321]

On the second commerce clause consideration, the Court found that the state tax did not impair federal uniformity for it neither implicated foreign policy issues nor violated a clear federal directive. Although a finding that the state tax might lead to foreign retaliation would raise foreign policy issues,[322] the Court identified three factors that weighed strongly against such an implication.[323] First, the

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[315]103 S. Ct. at 2950.

[316]*Id.* at 2952.

[317]*Id.* at 2939.

[318]441 U.S. 439 (1979). *See supra* notes 20-21 and accompanying text.

[319]103 S. Ct. at 2954.

[320]*Id.* at 2953-55.

[321]*Id.* at 2954-55. The Court distinguished *Japan Line* on several grounds. First, it involved a property tax instead of an income tax. *Id.* at 2952. Second, the state tax at issue in that case inevitably resulted in double taxation. *Id.* Finally, the incidence of the property tax fell on foreign rather than domestic corporations. *Id.* The Court recognized the difficulty of avoiding double taxation when allocating income among various taxing jurisdictions and called the task similar "to slicing a shadow." *Id.* at 2954.

[322]*Id.* at 2955.

[323]*Id.* at 2955-56.

tax did not automatically result in international double taxation. Second, the legal incidence of the tax fell on a domestic corporation and not a foreign corporation.[324] Third, the amount of tax paid by the corporation was more a function of the state's rate of taxation than it was of its allocation method. Finally, the Court refused to find that the state tax was preempted by federal statutes, or inconsistent with federal policy.[325]

D. Summary Comment on Container

One might argue that there are some endeavors in which a careful disorderliness is the best method. One such endeavor is the application of formula apportionment to purported unitary enterprises. The endeavor is careful not to step upon the limits of a constitutionally acceptable application. There is also a certain disorderliness to this endeavor because the states have adopted various apportionment formulas which strive to reach as much of the corporate income as possible. *Container* will cause apprehension among some corporate taxpayers in regard to both their compliance with a variety of state tax statutes and the possible multiple taxation of the same income. After *Container*, a state may elect two ways to tax the foreign-source in-

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[324]The Court acknowledged that the imposition of a tax on a corporation with a domestic domicile may lead to less significant foreign retaliation than in the case of a domestic corporation owned by foreign interests. The Court did not decide whether such a case would require it to alter its analysis. *Id.* at 2956 n.32.

[325]*Id.* at 2957. The dissent in this 5-3 decision did not consider whether in *Container* the taxpayer and its subsidiaries constituted a unitary business or whether the apportionment formula was fair because they found the California tax unconstitutional on foreign commerce clause grounds. Justice Powell was joined by Chief Justice Burger and Justice O'Connor in a dissenting opinion which viewed the state tax as clearly violating the foreign commerce clause. The principles which were enunciated in *Japan Line*, the dissent argued, should be controlling in this case because the facts in *Japan Line* were identical on the issues of double taxation and federal uniformity. *Id. See supra* notes 20-21 and accompanying text. The dissent maintained that double taxation is inherently inevitable because California had rejected the international norm in favor of a system which was fundamentally different in its basic assumptions. The risk of double taxation under the separate accounting, arm's length approach was said to be the result of disagreements in application only and not of structural differences as with unitary apportionment. 103 S. Ct. at 2958-59. On the issue of federal uniformity, the dissent maintained that the California tax is flatly inconsistent with federal policy. *Id.* at 2961. Therefore, the dissent concluded that the California tax violated the foreign commerce clause on both requirements under *Japan Line* and should be declared unconstitutional. *Id.* The dissent pointed out that the majority opinion did concede that the California tax had resulted in double taxation and that its decision ran contrary to the federal government's preference for the arm's length method adopted by the international community. *Id.* at 2957. As such, the dissent claimed that the majority failed to meet the requirements which a standard of review of close scrutiny demands in such a case under the foreign commerce clause. *Id.*

come of a domestic corporation. First, it may tax the dividends, interest, or capital gains received by a corporation doing business in the taxing state from its overseas affiliates. Second, it may tax the income of the overseas affiliates as a portion of the total combined income of a multinational corporate group, provided that the state properly determines the scope of the unitary enterprise and fairly apportions the income. With either approach, the income of the foreign corporation is indistinguishable from any other income of the domestic corporation when subjected to formula apportionment.

The equally weighted three-factor formula widely used by the states was not only approved by the Court in *Container*, but has become "something of a benchmark against which other apportionment formulas are judged."[326] Because an apportionment formula must bear a reasonable relation to all of the activities generating the income of a multinational enterprise, foreign property, payroll, and sales should be included in the equally weighted three-factor formula when calculating the state's share of the income of a multinational enterprise. The formula used in *Container* included property, payroll, and sales of the foreign subsidiaries, but the absence of those factors may lead to the inherent unfairness and difficulties which were the subject of the strong dissent in *Mobil*.[327]

Despite endorsing the application of the standard three-factor formula to the worldwide combined income of a multinational group of corporations, the Court in *Container* acknowledged the imperfections which are necessarily inherent in the formula.[328] The equal weight given to each of the three factors is arbitrary, and the formula does not reflect all of the factors which are material to the generation of income. The formula is based on the economic assumption that rates of return on property and payroll are roughly equal in various taxing jurisdictions. This assumption has clear weaknesses when made in the context of worldwide operations. Although variations in the cost of payroll and property in an interstate or a domestic context result in a margin of error in the apportionment of income, this margin of error is constitutionally acceptable because it is reasonable to assume that the rate of return on an investment in one state will roughly approximate the rate of return on an investment in another state. In an international context, however, the cost of payroll and property and the rates of return with respect to those factors vary so significantly from those in a domestic context that the economic assumption may no longer be valid. The application of the equally weighted three-factor formula to foreign operations, therefore, may

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[326]103 S. Ct. at 2943.

[327]*See supra* notes 157-58 and accompanying text.

[328]103 S. Ct. at 2949-50 & n.20.

be inherently arbitrary and entail unreasonable distortions in apportionment.

The result of the Court's opinion in *Container* is an endorsement of a substantial margin of error resulting from the application of the three-factor formula to the combined income of a global enterprise.[329] Formula apportionment divides the income of a multinational enterprise on the basis of a mathematical generalization.[330] If this approach was applied by all taxing jurisdictions, it should result in no double taxation of the income of a multinational unitary enterprise.[331] In order to eliminate double taxation, the Court would have to establish a single method of taxation among the taxing jurisdictions, a task which it considers to be a federal legislative responsibility.[332] Therefore, it is likely that multinational corporations will continue to be subjected to inconsistent formulas in the apportionment of income by many states. This marked lack of consistency among the formulas adopted by the states, compounded by the fundamental differences between formula apportionment and the international norm of a qualified separate accounting approach, will likely result in the taxation of more than all of the income of the multinational unitary enterprise.

Aside from the apportionment formulas themselves, many of the most significant issues in the state taxation of multinational corporations have arisen in relation to the determination of the existence of a unitary business and in the definition of the scope of the components which constitute the unitary enterprise. In the resolution of these issues, the Court has expressed a willingness to defer to the judgment of the state courts.[333] Given this fact, one can expect the state courts to continue to make crucial errors in determining the existence and scope of the unitary enterprise. Because of the Court's decision in *Container*, confusion and misunderstanding may also continue to exist with respect to the criteria used in establishing the extent of a unitary business.

Before the *Container* decision, it could have been argued that the Supreme Court had implicitly adopted a standard for finding a horizontally integrated business to be unitary: Was there a substantial flow of goods within the enterprise? The express adoption of a substantial flow of goods requirement as the predominant criterion for a unitary business relationship may have appropriately reflected the economic logic behind the development of formulary apportionment.[334] Coupled

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[329]*Id.* at 2950.

[330]*Id.* at 2952.

[331]*Id.* at 2942.

[332]*Id.* at 2943.

[333]*Id.* at 2945.

[334]The use of formulary apportionment has its origins in cases evidencing such complete functional integration through the interchange of products and services, that

with the other unitary business criteria adopted by the Court, that standard would have provided additional certainty for the state tax administrators, state courts, and multinational corporations.[335] In *Container*, however, the Supreme Court specifically rejected the narrow "flow of goods" test, finding it an inappropriate constitutional requirement to impose upon the states.[336] Although finding that the test for a unitary enterprise may be satisfied by a substantial flow of goods between a parent corporation and its subsidiaries, the Court stated that "[t]he prerequisite to a constitutionally acceptable finding of unitary business is a flow of *value*, not a flow of goods."[337] The Court rightfully adopted a flow of value standard in lieu of the taxpayer's proposed flow of goods test in *Container*.[338] What is problematic with the Court's pronounced prerequisite is that the concept of "value" is difficult to define. One may assume that a flow of value means a substantial interchange of products, markets, management services, technologies, capital resources, or other contributions to income which, in combination or degree, are relevant to substantial mutual interdependence among related corporations. In this context, the substantial flow of value requirement has the advantage of providing a controlling factor in an otherwise largely complex determination as to whether a business is unitary. The other essential factors such as functional integration, centralized management and operations, or other economies of scale gain greater meaning and become more determinative as useful criteria when used in conjunction with the fundamental requirement of a flow of value. Although reasonable minds may differ as to what constitutes a flow of value, the *Container* opinion has added much to our understanding of the delineation of a unitary business.

"[t]he legislature in attempting to put upon this business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders." Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271, 281 (1924). *See supra* notes 95-99 and accompanying text. For enterprises that manufactured products in one taxing jurisdiction and distributed them in others, formulary apportionment became a logically consistent and meaningful method for the division of the net income of a multijurisdictional corporation. In the absence of substantial mutual interdependence, as evidenced by such a substantial flow of trade, a coherent justification for apportionment may be lacking. *See* Hellerstein, *supra* note 83, at 501-02.

[335]This approach has been advocated by a leading commentator. *See* Hellerstein, *supra* note 83, at 501-02.

[336]103 S. Ct. at 2947 n.17.

[337]*Id.* at 2947.

[338]From an economic point of view, it is easy to demonstrate the existence of a unitary business where there is no significant flow of goods. *See* McClure, *Operational Interdependence is not the Appropriate 'Bright Line Test' of a Unitary Business—at Least Not Now*, 18 TAX NOTES 107 (1983).

VIII. CONCLUSION

This article has considered only the principal features of the unitary business/formula apportionment concepts. The important constitutional problems which are presented when a taxing state applies its particular version of formula apportionment to the income of related domestic and foreign corporations which are purportedly engaged in a multinational unitary enterprise have been described. The challenges to the application of the unitary business/formula apportionment concepts have been advanced by corporate taxpayers primarily under the due process and commerce clauses. Although commerce clause considerations bear directly upon the issues associated with fair apportionment, especially in the international context, due process considerations have been more important, or at least more fundamental, as a means for resolving the problems.

The first step toward resolution of the problems raised by the unitary business/formula apportionment concepts can be understood only by reference to actual business practices. The unitary business/formula apportionment approach is not to be perceived as a countermovement by any level of government against the formal geographical or transactional accounting approach for determining a state's appropriate share of the income of an integrated corporate group; rather, it is the logical consequence of both revenue objectives of government and accounting techniques used by corporations. Some corporations prefer unitary apportionment over separate accounting because it may result in undertaxations or a more reasonable tax liability. Originally, the separate accounting approach was preferred by the states for the determination of the income tax of a corporation doing business largely within the state. As the activities of corporations spread across interstate boundaries, however, the application of some variation of formula apportionment became a practical necessity for the purpose of the fair division of the corporation's income among several taxing jurisdictions. The interstate businesses of corporations have become so functionally integrated that separate accounting is no longer practical. The next logical development of the unitary apportionment approach was its application to the interstate operations of affiliated corporations deemed to be a single unitary enterprise. Finally, whether a state is taxing an affiliated group of domestic corporations engaged in activities generating income in an interstate context, or an affiliated group of domestic and foreign corporations engaged in activities generating income both in an interstate and an international context does not appear to amount to a logically or constitutionally significant difference. The application of formula apportionment seems proper when a particular set of activities of a related group of corporations as a practical necessity renders the application of separate accounting improper. Worldwide combined reporting of

multinational corporate income, then, is the logical conclusion of an apportionment technique applied to regional railroad property a century ago.

In four recent cases, the United States Supreme Court has considered the constitutional implications of the state taxation of the income of a multinational group of corporations. In these decisions, a searching inquiry has been made into the understanding of the unitary business principle. Much guidance is made available through the study of these opinions. They establish that related domestic and foreign corporations may be treated as a unitary business to the extent that there is a sharing or an exchange of value throughout the multinational corporate group as evidenced by substantial mutual interdependence. As a necessary corollary to determining the scope of the unitary enterprise, the cases also establish that the apportionment of the income of the unitary business between the taxing state and the rest of the world must take into account a reasonable measure of the income generating activities of the unitary business, conducted as a whole, and its concrete relationship to activities within the state. In *Mobil*, the Court approved the state taxation of foreign-source dividends as part of the domestic recipient's apportionable income, but only because the Court assumed that the payor subsidiaries were engaged in a unitary business relationship with the parent corporations. In *ASARCO* and *Woolworth*, the court confined its analyses to due process considerations, and, as in *Mobil*, the unitary business principle formed the linchpin of its decision. The Court determined that a state cannot include foreign-source income in the apportionable income of a nondomiciliary corporation doing business in a taxing state when it can be demonstrated that the payor subsidiaries are discrete business enterprises apart from the parent corporation and have no other connection with the taxing state. In *Container*, the Court held that the worldwide combined income of a domestic corporation and its foreign subsidiaries is subject to unitary apportionment without contravention of the due process clause as long as the unitary business test has been properly applied and the apportionment formula is fair. In so holding, the Court declined to endorse the proposition that it was necessary to a finding of a unitary business that there be a continuous and signficant product flow between the domestic parent corporation and its foreign subsidiaries in the absence of vertical integration among the corporations. Instead, the Court chose to establish the unitary business relationship in the totality of the circumstances which necessitates a case by case determination of whether there exists substantial mutual interdependence sufficient to justify the finding of a unitary business.

The attitude taken by the Court to the taxing power of the states in these four cases is quite consistent with that which the Court has

followed in previous state tax cases—an attitude of judicial restraint or nonintervention. The constitution places limited restrictions on the taxing power of the states and the Court is unlikely to alter its traditionally limited function with respect to the adjudication of these matters. The Court declines to intervene into the complexities of state finance and impose general legal formulations upon the taxing power of the states where those principles are not constitutionally required. In the absence of congressional action, the Court has developed objective standards which are not intended to extend beyond the concrete circumstances to which they are applied. These standards reflect the Court's generalizations with respect to the practical operation of state corporate income taxes. In these cases, the Court has affirmed the latitude which the states have in taxing the income of multinational corporations.

Notes

Exclusive Juvenile Jurisdiction to Authorize Sterilization of Incompetent Minors

I. Introduction

In the absence of judicial condonation, parents do not have the power to consent to sterilization procedures for their minor children in Indiana. This rule was first enunciated in the 1975 case of *A.L. v. G.R.H.*,[1] where a mother's request for declaratory judgment proclaiming her right to have her son sterilized under the common law attributes of the parent-child relationship was denied.[2] The Indiana Court of Appeals for the Second District recently reaffirmed this rule in *P.S. v. W.S.*,[3] where the court stated that "[a]ffirmative judicial authorization must be obtained for sterilization of an incompetent."[4] The Indiana Supreme Court subsequently vacated this court of appeals' opinion; however, the supreme court did not discuss whether parents have the authority to give substituted consent for the sterilization of their minor children in the absence of judicial action.[5]

P.S. v. W.S. arose when a child, by her next friend, petitioned the trial court for injunctive relief when her parents sought to have her sterilized. Because the parents insisted that they did not need judicial authorization in order to proceed with their daughter's sterilization, the court of appeals ruled that it was not presented with the issue of whether a court could grant such a sterilization petition.[6] Chief Judge Buchanan dissented, declaring that the majority's refusal to decide this issue was an exaltation of form over substance.[7] "As the trial court recognized, denial of P.S.'s request for injunctive relief *was in fact* an authorization. Implicit in the denial of injunctive relief by the trial court is the determination that the proposed action is justified and appropriate."[8] The state supreme court agreed with Chief Judge Buchanan.[9] Ruling that the trial court had the power to grant

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[1]163 Ind. App. 636, 325 N.E.2d 501 (1975).

[2]*Id.* at 638, 325 N.E.2d at 502.

[3]443 N.E.2d 67 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983).

[4]443 N.E.2d at 73.

[5]452 N.E.2d 969 (Ind. 1983). By recognizing judicial power to authorize sterilization, however, the court implicitly acknowledged the absence of parental authority to act without court permission to procure sterilizations of their minor children.

[6]443 N.E.2d at 70-71.

[7]*Id.* at 73 (Buchanan, C.J., dissenting).

[8]*Id.*

[9]452 N.E.2d at 975.

P.S.'s parents permission to have their daughter sterilized,[10] the majority of the Indiana Supreme Court had no difficulty in holding that juvenile courts have jurisdiction over such sterilization matters.[11] However, the court split three to two on the appropriate basis for parental authority to have a child sterilized. The two concurring justices believed that "Indiana courts have no jurisdiction upon application of parents, relatives, legal representatives, doctors, hospitals, or others to authorize or order the sterilization of retarded or other incapacitated persons, in the absence of express enabling legislation."[12] The concurring justices stated that in this case, "it is the statute[13] and not the judgment denying the [child's] petition [for an injunction] which gives legal sanction to the decision of the parents and doctors."[14]

In light of this conflict among the members of Indiana's highest court, this Note will examine the bases for jurisdiction in the Indiana courts in order to determine which courts have the power to entertain petitions to sterilize incompetent minors.[15] Given the large number of disabled children alive today,[16] it is likely that sterilization may be medically indicated for numerous incompetent minors in Indiana. Thus, the question of which court should hear these petitions for sterilization needs to be resolved.

II. STERILIZATION: URGENT NEED FOR A SPECIAL POPULATION

In 1980, 3,234,337 children were enrolled in special education programs in public elementary and secondary schools in the United States; 658,082 were retarded, and 52,158 were multihandicapped.[17] These statistics do not encompass all disabled children—or even all of those with severe disabilities—but they do show that there is a sizable population of handicapped children with special needs that the law

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[10]*Id.*

[11]*Id.* at 976.

[12]*Id.* at 977 (DeBruler, J., concurring). Justice Prentice joined in both the majority opinion and Justice DeBruler's concurrence.

[13]IND. CODE §§ 16-8-3-1, 16-8-4-2 (1982), which authorize "medical or surgical treatment" of a minor upon consent of a parent.

[14]452 N.E.2d at 977 (DeBruler, J., concurring).

[15]The phrase "incompetent minor" is redundant because all minors are presumed to be incompetent. For the purpose of this Note, the phrase will be used to refer to minors who may never become competent because of a mental deficiency and/or mental illness.

[16]*See generally* DIGEST OF EDUCATION STATISTICS (1982).

[17]*Id.* The disabilities of those children enrolled in public special education programs were broken down as follows: educable mentally retarded, 563,364; trainable mentally retarded, 94,718; hard of hearing, 28,740; deaf, 17,850; speech impaired, 908,241; visually handicapped, 17,330; seriously emotionally disturbed, 182,931; orthopedically impaired, 39,119; other health impaired, 66,381; specific learning disability, 1,262,535; deaf-blind, 960; and multihandicapped, 52,168. *Id.* at 42.

must find a way to meet. Some of these children with more severe problems need to be sexually sterilized for their own well being. The case of *P.S. v. W.S.*,[18] involving a child whose parents believed that sterilization was necessary for their daughter's own good, illustrates the intensity of this need for sterilization.

P.S. had IQ scores in the twenties and thirties[19] and had been diagnosed as suffering from retardation, autism,[20] and dyspraxia.[21] She was toilet trained but had frequent accidents.[22] "She has some self-care capabilities: she can dress herself, brush her hair and teeth, wash and bathe herself and regulate the bath water. However, . . . her performance of these tasks is not consistent."[23]

> P.S. is self-injurious, destructive, bangs her head on hard surfaces, picks at her fingers and arms until they bleed and plays with the blood. She has a fascination with blood and likes to play in it. She inflicts injury upon herself to draw blood and then picks at the injury to make it bleed so she can play with the blood. She seems impervious to pain.[24]

Testimony at trial indicated that the onset of menstruation would be dangerous for P.S. One of her physicians felt that

> due to the pattern that P.S. has shown so far it is very reasonable to feel that P.S. might try to induce bleeding by

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[18]443 N.E.2d 67 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983).

[19]452 N.E.2d 969, 971 (Ind. 1983). The IQ (intelligence quotient) is generally arrived at by dividing the subject's mental age (test age) by his or her calendar age (chronological age) and multiplying the quotient by one hundred. HALLAS, THE CARE AND TRAINING OF THE MENTALLY SUBNORMAL 237 (4th ed. 1970). However, IQ can be measured in many ways and provides only an average of the abilities of the person being tested. Scores between 90 and 110 are considered average. *Id.* at 236-41; *see* E. FRENCH & J. SCOTT, HOW YOU CAN HELP YOUR RETARDED CHILD 66-79 (1967); J. NEISWORTH & R. SMITH, RETARDATION ISSUES, ASSESSMENT AND INTERVENTION 269-95 (1978).

[20]452 N.E.2d at 970. Autism has been defined as

> a severely incapacitating, lifelong developmental disability . . . caused by physical disorders of the brain. . . . The range of human emotions is not understood by the majority of autistic children. All social skills must be taught; autistic persons appear to have no understanding of social expectations . . . . [M]ost are hyperactive. . . . Due to the bizarre skills development pattern, an autistic child might be able to read a college textbook with some degree of understanding, yet not be toilet trained.

Autism is . . . , Riley Times, Vol. II No. II, 1981, at 2, col. 3.

[21]452 N.E.2d at 971. Dyspraxia involves "difficulty in carrying out tasks which require precise, fine movements of a complex nature such as writing and drawing." T.E. OPPE, NEUROLOGICAL EXAMINATION IN PEDIATRIC NEUROLOGY 1, 11 (F. Clifford Rose ed. 1956). *See also* K. SWAIMAN & F. WRIGHT, THE PRACTICE OF PEDIATRIC NEUROLOGY 266 (2d ed. 1982).

[22]452 N.E.2d at 971.

[23]443 N.E.2d at 69.

[24]452 N.E.2d at 971.

> poking into her vagina or abdomen in an attempt to keep the blood flowing. This, of course, would result in hemorrhaging and infection, and possibly death.[25]

P.S.'s parents thought sterilization might be proper for their daughter and consulted many physicians and the staff members at P.S.'s day treatment center regarding their belief. All agreed "that P.S. would be unable to handle the onset of menses . . . and would be unable to care for a child should she bear one."[26]

A partial hysterectomy that would remove P.S.'s uterus and prevent her from menstruating was scheduled, but the child, by her next friend, brought suit to enjoin the operation. The complaint alleged that sterilization was unnecessary because the residential treatment institution which P.S. would be attending had considerable experience in this area and was prepared to teach P.S. to care for her own hygienic needs during menstruation. The trial court denied the child's request for injunctive and declaratory relief, finding that the parents were acting in their daughter's best interest and were the proper persons to act on her behalf. The Indiana Court of Appeals for the Second District reversed because the burden of proof had been improperly placed upon the child.[27] The Indiana Supreme Court vacated the court of appeals' opinion, stating that misplacement of the burden of proof was harmless error in light of the overwhelming evidence showing that sterilization was in the child's best interest.[28]

Other cases have documented the sad circumstances that call forth a desire to sterilize incompetent adolescents.[29] The medical profession has recognized the beneficial results which sterilization can create in proper cases,[30] but frequently physicians want a court order before

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[25]*Id.* at 972.

[26]*Id.*

[27]443 N.E.2d at 72-73.

[28]452 N.E.2d at 976.

[29]*See, e.g.*, Ruby v. Massey, 452 F. Supp. 361 (D. Conn. 1978); *In re* A.W., 637 P.2d 366 (Colo. 1981); *In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974); *In re* Penny N., 120 N.H. 269, 414 A.2d 541 (1980).

[30]A case history reported by Jane C. Perrin, M.D., will serve to illustrate the successes which the medical profession has found to result from sterilization of incompetent minors:

> A 14-year-old girl, the youngest of ten children, was a premature baby with trisomy 21 Down syndrome . . . and severe myopia. She . . . showed an I.Q. of 30 with minimal speech development.
>
> At . . . age 10 1/2 menarch [was observed] with heavy flow. During menses she became frightened and withdrawn, refusing to eat and going to bed or crawling under the bed. She did not understand repeated explanation of menses by her mother, could not cope with menstrual hygiene, and had to be kept home from school during menstrual periods.
>
> The patient had total abdominal hysterectomy under general anesthesia without difficulty at age 11. . . . In three years after surgery, she was reported

going ahead with a desirable sterilization operation upon an incompetent.[31] The focus of the remainder of this Note will be on which courts in Indiana have jurisdiction to issue such orders.

III. JURISDICTIONAL FOUNDATIONS

A. Procreative Choice: A Fundamental Right

Because there is a fundamental right to choice in matters of procreation,[32] one might question whether any court has the power to rule on sterilization petitions. Constitutional mandates require, however, that the power lie in at least one court so that the rights of incompetents are not rendered null and void. The fundamental right to procreation was initially recognized in *Skinner v. Oklahoma*.[33] That case involved a compulsory sterilization statute which required sterilization for certain classes of convicted criminals, but not for others. The United States Supreme Court found a denial of equal protection in the eugenic statute.[34] Under Oklahoma's legislative scheme, a person convicted of stealing twenty-one dollars worth of chickens would be subject to sterilization, but an embezzler who took hundreds of dollars from his employer would not. The Court could see no more likelihood of "bad genes" being passed along to offspring in one class than in the other and declared that there was a fundamental right to procreation.

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty.[35]

Later decisions by the Supreme Court have made it clear that the right to procreate also implies the right *not* to procreate—that the fundamental right is actually the "right of decision in matters of

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to have a happier personality at home with no episodes of withdrawal, and she did not miss school. There was no history of sexual activity or molestation.

Perrin, *A Considered Approach to Sterilization of Mentally Retarded Youth*, 130 AM. J. OF DISEASES OF CHILDREN 288, 289 (1976).

[31] *Id.* at 290.

[32] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

[33] *Id.*

[34] Eugenic theories involve the elimination of "undesirable" traits (e.g., criminality, insanity, and retardation) by rendering persons with undesirable characteristics incapable of reproduction. *See* Note, *Eugenic Sterilization in Indiana*, 38 IND. L.J. 275 (1963).

[35] 316 U.S. at 541.

childbearing."[36] Where there is a fundamental right to choose, the right to select the most appropriate or desirable alternative must be made available, to the greatest extent practically possible, to every person regardless of disability. In cases of incompetents with no hope of attaining competency, the right to choose should be placed in the hands of guardians with court supervision and intervention to ensure that the best interests of the incompetent are considered foremost.

In *In re Grady*,[37] the New Jersey Superior Court explained that there is a constitutional requirement that some court have jurisdiction to hear sterilization petitions.

> [T]he critical question [is] whether the *parens patriae* jurisdiction of the Chancery Court may be invoked to permit the court to consider the parents' request to give substituted consent on behalf of their incompetent child. Were substituted consent impermissible, the very incompetence which entitles one to special protection would become the obstacle to the exercise of those constitutional privileges necessary for enjoyment of that special protection. Refusal to provide a technique for vindication of a basic constitutional right is itself an unconstitutional deprivation.[38]

Therefore, the United States Constitution requires the states to establish at least one court with jurisdiction to hear sterilization petitions.

B. Indiana Jurisdictional Bases

In Indiana, the structure of the court system is a product of the state constitution and the Indiana General Assembly.[39] These sources determine which court has the power to hear any particular case. The Indiana Constitution vests the state's judicial power in "one Supreme Court, one Court of Appeals, Circuit Courts, and such other courts as the General Assembly may establish."[40] Because the state constitution declares that all judicial power belongs in the courts, the *total* jurisdiction of Indiana's courts remains constant and is not subject to reduction by the General Assembly. The legislature may pass jurisdictional statutes that delegate various portions of the total

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[36]Carey v. Population Servs. Int'l, 431 U.S. 678, 688-89 (1977) (explaining Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965)).

[37]170 N.J. Super. 98, 405 A.2d 851 (1979), *aff'd*, 85 N.J. 235, 426 A.2d 467 (1981).

[38]170 N.J. Super. at 120, 405 A.2d at 862. *But see In re* S.C.E., 378 A.2d 144 (Del. Ch. 1977) (holding that incompetents should be permitted a choice in procreation matters).

[39]9 W. HARVEY, A. GOLDSTEIN & R. LEHMAN, INDIANA PRACTICE § 1.2, at 2 (1972).

[40]IND. CONST. art. VII, § 1.

judicial power to different courts by statutorily moving the jurisdiction from one court to another. However, jurisdiction may not be eliminated because that would amount to removing the judicial power from the courts, a result forbidden under the state constitution.[41] The Indiana Constitution gives the circuit courts "such civil and criminal jurisdiction as may be prescribed by law,"[42] and courts have recognized that there are several sources of law in Indiana in addition to the Indiana Code.[43]

These provisions demonstrate that the Indiana Constitution delegates jurisdiction to the courts only in general terms, leaving to the legislature the assignment of original jurisdiction in particular types of cases. The legislative response has been to create three types of courts of original jurisdiction: those with general jurisdiction, those with limited jurisdiction, and those with special jurisdiction.

IV. COURTS OF GENERAL JURISDICTION

The Indiana Code provides for the operation of several courts of original jurisdiction[44] in addition to the constitutionally mandated circuit courts.[45] The jurisdictional bases of each of these courts will be examined in order to determine which is the most appropriate to hear sterilization petitions.

A. Circuit Courts

The circuit courts have "original exclusive jurisdiction in all cases at law and in equity whatsoever . . . of all . . . causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer."[46] Because this language

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[41]This argument was found persuasive in *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981), where the court held that constitutional language granting circuit courts original jurisdiction over all matters civil and criminal "only allows for a legislative reallocation of jurisdiction from the circuit court to another court. It does not permit the legislature to divest the constitutional grant of jurisdiction from the unified court system." *Id.* at 545, 307 N.W.2d at 886. Professor Harvey has described the limits on legislative power over the courts in Indiana: "The General Assembly can pass laws affecting them only so long as the legislation does not conflict with specific provisions or the spirit of the Constitution." 9 W. HARVEY, A. GOLDSTEIN & R. LEHMAN, *supra* note 39, § 1.3, at 2-3.

[42]IND. CONST. art. VII, § 8.

[43]*See, e.g.*, Monteith Bros. Co. v. United States, 48 F. Supp. 210, 211 (N.D. Ind. 1942) (judgment); Bills v. City of Goshen, 117 Ind. 221, 225, 20 N.E. 115, 117 (1889) (ordinance); Paul v. Davis, 100 Ind. 422, 426 (1884) (case law unless there is an unsettled condition).

[44]IND. CODE §§ 31-6-2-1, -1.5 (1982) (juvenile courts); *id.* §§ 33-4-3-1, 33-4-4-3 (circuit courts); *id.* tit. 33, art. 5 *passim* (superior courts); *id.* § 33-6-1-2 (municipal courts); *id.* §§ 33-10.1-2-2 to -7 (city and town courts); *id.* §§ 33-10.5-3-1 to -3, -5 (county courts).

[45]IND. CONST. art. VII, §§ 7, 8, 9.

[46]IND. CODE § 33-4-4-3 (1982).

is so broad, it would appear that sterilization petitions should fall within the general jurisdiction of the circuit courts unless some other statute specifically grants exclusive jurisdiction to another court, board, or officer.[47] Although no court has ever held that such a statute exists, the jurisdiction of the circuit court has been challenged in a case involving a petition to sterilize a minor.

In *Stump v. Sparkman*,[48] a mother presented a petition for the sterilization of her fifteen-year-old daughter to Judge Harold D. Stump of the Circuit Court of DeKalb County. The petition contained an affidavit by the mother stating that her daughter, Linda, was "somewhat retarded,"[49] although she attended public school and had been passed on to the next grade each year along with other children her age. The affidavit stated that Linda associated with older youth and young men and had stayed out overnight with them. The mother claimed that she could not watch over Linda each and every minute and therefore wanted to have a tubal ligation performed in order to prevent "unfortunate circumstances."[50]

Judge Stump approved the petition on the same day it was presented in an ex parte proceeding without a hearing, notice to the daughter, or appointment of a guardian ad litem. Soon afterwards, Linda was taken to the hospital and told that she was about to have her appendix removed; a tubal ligation was performed during that hospital stay. Two years later, Linda married. When she could not become pregnant, she learned the true nature of the earlier surgery. She brought a civil rights action in federal court against her mother, her mother's attorney, the judge, the physicians who performed and assisted in the operation, and the hospital. The trial court sustained a motion to dismiss as to all defendants on the basis of judicial immunity.

The Court of Appeals for the Seventh Circuit reversed.[51] The appellate court stated that judicial immunity only attaches in the presence of jurisdiction, and that there was no jurisdiction to authorize this sterilization. The court of appeals essentially rejected the argument that the general grant of original jurisdiction to "all cases in law and in equity"[52] was broad enough to cover this situation.

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[47]This section of the Note will deal only with circuit courts qua circuit courts. Some circuit courts also have power as juvenile and/or probate courts. Their jurisdiction in these capacities will be discussed separately in later sections of this Note. *See infra* notes 88-152 and accompanying text.

[48]435 U.S. 349 (1978).

[49]*Id.* at 352 n.1 (the full text of the Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement is reprinted in footnote 1 of the Court's opinion).

[50]*Id.*

[51]Sparkman v. McFarlin, 552 F.2d 172 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

[52]IND. CODE § 33-4-4-3 (1982).

> [W]e cannot accept the assertion that [the jurisdictional grant] cloaks an Indiana circuit judge with blanket immunity. He may not arbitrarily order or approve anything presented to him in the form of an affidavit or petition. A claim must be characterized as a case in law or [in] equity in order to come within the statute. In short, it must have a statutory or common law basis.[53]

This negation of the district court's claim of jurisdiction had three bases. First, the court looked to the state's statutes to determine if there was legislative authorization to order sterilizations. Indiana Code section 16-13-13-1,[54] which was in effect at the time, permitted sterilization of institutionalized persons following specified procedures, but made no provision for sterilization of noninstitutionalized persons. The court claimed that in omitting noninstitutionalized persons from the language of the statute, the Indiana legislature must have intended to exclude that particular class from the statute's coverage. Secondly, the court said that even if this statute had not foreclosed jurisdiction in this case, the judge's action surpassed his common law powers. Looking to existing case law, the court said it could find no authority to support a sterilization order.[55] The court held that the judge's order was not within the power of courts to fashion new common law because judges "may not use the power to create new decisional law to order extreme and irreversible remedies such as sterilization in situations where the legislative branch of government has indicated that they are inappropriate."[56] Finally, the court of appeals said that Judge Stump's action was an "illegitimate exercise of his common law power because of his failure to comply with elementary principles of procedural due process."[57]

The United States Supreme Court disagreed with this reasoning and reversed,[58] asserting that the scope of a judge's jurisdiction should

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[53]552 F.2d at 174.

[54]This section read as follows:

> Whenever the superintendent of any hospital or other institution of this state, or of any county in this state, which has the care or custody of insane, feeble-minded or epileptic persons, shall be of the opinion that it is for the best interests of the patient and of society that any inmate of the institution under his care should be sexually sterilized, such superintendent, if a lawfully licensed physician and surgeon, is hereby authorized to perform, or cause to be performed by some capable physician or surgeon, an operation or treatment of sterilization on any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, epilepsy, or incurable primary or secondary types of feeble-mindedness: Provided, That such superintendent shall have first complied with the requirements of this act.

IND. CODE § 16-13-13-1 (1971) (repealed 1974).

[55]552 F.2d at 175.

[56]*Id.* at 176.

[57]*Id.*

[58]Stump v. Sparkman, 435 U.S. 349, 355 (1978).

be construed broadly where it is being determined for the purpose of judicial immunity.[59] The Court then examined the broad jurisdictional grant, which reads in relevant part:

> Said court shall have original exclusive jurisdiction in all cases in law and in equity whatsoever. . . . It shall also have exclusive jurisdiction of the settlement of decedents' estates and of guardianships . . . and it shall have jurisdiction of all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board or officer.[60]

Because the jurisdictional statute did not itemize all types of cases that could be heard, the failure to mention sterilization was not fatal. The Court found that the inference which the court of appeals drew from the statute on sterilization of institutionalized persons was unwarranted, particularly because parents had authority under Indiana statutes to "consent to and contract for medical or hospital care or treatment of [the minor] including surgery."[61] The total absence of case law and statutory law in 1971 prohibiting circuit court judges from acting upon sterilization petitions was found significant.[62] The Court found that Indiana law had vested Judge Stump with the power to entertain and act upon the petition.[63]

Because the Court in *Stump* was faced with a judicial immunity question, it construed the jurisdictional grant more broadly than it might have done in other procedural circumstances.[64] Therefore, its holding is persuasive, but not conclusive, authority on the jurisdictional question in sterilization cases where there is an absence of specific statutory language granting or denying jurisdiction.[65] Nonetheless, *Stump* did open the door for judicial consideration of

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[59]*Id.* at 356.

[60]435 U.S. at 357 n.8 (quoting IND. CODE § 33-4-4-3 (1975)).

[61]435 U.S. at 358 (quoting IND. CODE § 16-8-4-2 (1973)).

[62]435 U.S. at 358.

[63]The Court stated that judicial immunity would fail to attach only in the "clear absence of all jurisdiction." *Id.* at 357 (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872)). The Court distinguished acts done in the absence of jurisdiction from those done in excess of jurisdiction.

> [I]f a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune.

435 U.S. at 357 n.7 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 352 (1872)). This distinction is irrelevant to the holding, however, because the Court found that Judge Stump did in fact have jurisdiction. 435 U.S. at 364.

[64]*See In re* C.D.M., 627 P.2d 607, 612 (Alaska 1981).

[65]*See id.* (*Stump* is instructive though not conclusive on the jurisdictional issue).

sterilization petitions. Prior to that case, judges in some state courts may have been reluctant to grant sterilization petitions for fear that subsequent civil liability would be imposed when a reviewing court determined that such petition was granted without jurisdiction.[66] Possibly to protect themselves, courts showed a tendency to find no jurisdiction over sterilization cases.[67] Actually, these findings of no jurisdiction were, for the most part, mistaken.

> [T]hese decisions confuse the question of a court's authority to hear and decide such matters with the question of whether, in exercising that authority, the court can order a particular individual sterilized without violating his or her constitutional rights. As a result, these courts have held that they lacked *jurisdiction* when their concern should have been whether or not an order sanctioning the sterilization of a particular incompetent would have been *constitutional.*[68]

In the post-*Stump* era, other states considering the question have shown a decided trend in favor of acting upon such petitions.[69] Given the broad interpretation other states have given to jurisdictional grants when considering sterilization matters and the Indiana legislature's failure to take action to avoid a similar interpretation here,[70] it appears that the jurisdictional grant given to the circuit courts does, indeed, give these courts power to hear such petitions unless one of the statutory courts has exclusive jurisdiction in this area.

B. Superior Courts

Superior courts have the broadest jurisdictional grant[71] among Indiana's statutory courts. Their jurisdiction generally parallels and is

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[66]The cause of such fear was not unfounded. *See* Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971), *motion denied*, 365 F. Supp. 380 (S.D. Ohio 1973) (applying Ohio law, judicial immunity denied in action against judge who ordered a person to submit to sterilization).

[67]*See, e.g.*, Wade v. Bethesda Hosp., 337 F. Supp. 671 (S.D. Ohio 1971), *motion denied*, 365 F. Supp. 380 (S.D. Ohio 1973) (applying Ohio law); Guardianship of Kemp, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974); Holmes v. Powers, 439 S.W.2d 579 (Ky. 1968); *In re* M.K.R., 515 S.W.2d 467 (Mo. 1974).

[68]*In re* C.D.M., 627 P.2d 607, 610 (Alaska 1981) (emphasis in original).

[69]*See id.*; *In re* A.W., 637 P.2d 366 (Colo. 1981); *In re* Penny N., 120 N.H. 269, 414 A.2d 541 (1980); *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981); *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980); *In re* Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981). *But see* Hudson v. Hudson, 373 So. 2d 310 (Ala. 1979).

[70]This does not mean that the state legislature cannot pass legislation forbidding sterilization of minors as a matter of policy; such legislation would address the merits of the issue, not the jurisdictional question.

[71]*See* IND. CODE tit. 33, art. 5 *passim* (1982).

concurrent with that of the circuit courts. Each superior court has its own jurisdictional statute[72] granting jurisdiction over criminal cases and civil cases in law and in equity. As far as probate and juvenile jurisdiction are concerned,[73] in some counties, these powers lie exclusively in either the circuit or superior court; in others, they are concurrent in both the circuit and superior courts. Under this general concurrent scheme, the superior courts should also have jurisdiction over sterilization of incompetent minors unless another court has exclusive jurisdiction by statute.[74]

The power of the superior courts in this area was tested in the pre-*Stump* case of *A.L. v. G.R.H.*[75] The mother of a fifteen-year-old boy filed a complaint for declaratory judgment in Vanderburgh Superior Court seeking permission to have a vasectomy performed upon her son, G.R.H. She brought the action under the "common law attributes of the parent-child relationship."[76] Two years before the action, G.R.H.'s IQ was tested at sixty-three, but by the time of trial it measured eighty-three, which placed him in the borderline area.[77] G.R.H. was interested in girls, liked to kiss, and wanted to date. His mother feared that he might become sexually active and impregnate one of the retarded or handicapped children in his special education classes. The trial court denied the mother's petition and she appealed. The Indiana Court of Appeals for the Third District affirmed the denial, stating, "[W]e believe the common law does not invest parents with such power over their children even though they sincerely believe the child's adulthood would benefit therefrom."[78]

This case has been cited for the proposition that Indiana courts do not have jurisdiction to permit sterilization in the absence of informed consent or specific legislative authority.[79] The Court of Appeals for the Third District seemed to endorse this interpretation by relying on cases from Missouri[80] and California[81] which held that "their respective juvenile statutes making general provision for the welfare of children were insufficient to confer jurisdiction to authorize the

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[72]*E.g.*, IND. CODE § 33-5-5.1-4 (1982) (Allen Superior Court); *id.* § 33-5-8-5 (Bartholomew Superior Court); *id.* § 33-5-9-5 (Boone Superior Court); *id.* § 33-5-10-2.5(b) (Clark Superior Court); *id.* § 33-5-11-4 (Delaware and Grant Superior Court); *id.* § 33-5-12-3 (Delaware Superior Court No.2); *id.* § 33-5-13-2 (Elkhart Superior Court).

[73]*See infra* note 100.

[74]*See supra* note 47 and accompanying text.

[75]163 Ind. App. 636, 325 N.E.2d 501 (1975), *cert. denied*, 425 U.S. 936 (1976).

[76]*Id.* at 636-37, 325 N.E.2d at 501.

[77]"Borderline area" is a medical classification of intelligence for mildly retarded persons on the borderline of normal intelligence. *See supra* note 15.

[78]163 Ind. App. at 638, 325 N.E.2d at 502.

[79]Annot., 74 A.L.R.3d 1224, 1228-29 (1976).

[80]*See In re* M.K.R., 515 S.W.2d 467 (Mo. 1974).

[81]*See In re* Kemp's Estate, 43 Cal. App. 3d 758, 118 Cal. Rptr. 64 (1974).

sterilization of retarded girls in the absence of specific sterilization legislation."[82] However, as the United States Supreme Court in *Stump v. Sparkman* indicated, the holding in *A.L. v. G.R.H.* does not go to the jurisdictional issue, but rather speaks only to the merits.

> The opinion . . . speaks only of the rights of the parents to consent to the sterilization of their child and does not question the *jurisdiction* of a . . . judge who is presented with such a petition from a parent. Although under that case a . . . judge would err as a matter of law if he were to approve a parent's petition seeking the sterilization of a child, the opinion in *A.L. v. G.R.H.* does not indicate that a . . . judge is without jurisdiction to entertain the petition. Indeed, the clear implication of the opinion is that, when presented with such a petition, the . . . judge should deny it on its merits rather than dismiss it for lack of jurisdiction.[83]

The case's precedential value for mentally incompetent minors is questionable because G.R.H., while legally incompetent, was "sufficiently intelligent to understand what was involved in sterilization and to participate in the decision making process."[84] There was no showing that G.R.H. would benefit from sterilization or that he was incapable of exercising his own right of choice in procreation matters. The case discussed the mother's belief that G.R.H.'s adulthood would benefit from the surgery, but made no mention of testimony showing that her belief had any basis in fact. Rather, the emphasis seemed to be upon protecting the women with whom he might come into contact. The precedential value given the case should be strictly limited to this fact situation.[85] The sole purpose for sterilizing G.R.H.

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[82]163 Ind. App. at 638-39, 325 N.E.2d at 502. The Seventh Circuit Court of Appeals made the same interpretation of these cases in Sparkman v. McFarlin, 552 F.2d 172, 175 (7th Cir. 1977), *rev'd sub nom.* Stump v. Sparkman, 435 U.S. 349 (1978).

[83]435 U.S. at 358-59.

[84]163 Ind. App. at 637, 325 N.E.2d at 502.

[85]The Supreme Court's interpretation of *A.L. v. G.R.H.*, in Stump v. Sparkman, 435 U.S. 349 (1978), may be read as so limiting that case, although the Indiana Supreme Court appears to have read that interpretation differently. Referring to *A.L. v. G.R.H.*, the United States Supreme Court stated that "*under that case* a . . . judge would err as a matter of law if he were to approve" the parent's sterilization petition. *Id.* at 359 (emphasis added). The use of the language "under that case" seems to limit the Court's interpretation to the facts of the *A.L.* case.

Later in the same discussion, however, the Court stated that the "clear implication" of *A.L. v. G.R.H.* is that, "when presented with *such a petition*, the . . . judge should deny it on its merits rather than dismiss it for lack of jurisdiction." *Id.* (emphasis added). It is plausible to read the emphasized language as meaning a sterilization petition so clearly unmeritorious as that presented in *A.L. v. G.R.H.*

On the other hand, the Indiana Supreme Court in P.S. v. W.S., 452 N.E.2d 969 (Ind. 1983), appears to have read the language of the Court to mean *any* sterilization

was to prevent him from fathering children. The court's decision did not limit jurisdiction in sterilization petition cases. The holding was limited so that it concerned only the issue of parental consent to the sterilization of minor children as part of the general parental consent to the performance of medical and hospital services. Consequently, superior courts, like circuit courts, have the power to hear petitions to authorize the sterilization of incompetent minors unless there is another court which has exclusive jurisdiction in this area.

V. Courts of Limited Jurisdiction: Municipal, City, and County Courts

Municipal, city, and county courts have very limited jurisdiction in Indiana. Their enabling statutes outline in specific detail the types of cases they may hear.[86] Generally, their power is limited to violations of local ordinances and traffic laws and to civil cases where the amount in controversy does not exceed a jurisdictional limit.[87] Because of the limited nature of the jurisdiction granted to these statutory courts, they do not have power to hear petitions to authorize sterilization of incompetent minors.

VI. Courts of Special Jurisdiction

A. Probate Courts

Responsibility for guardianships of incompetent persons is placed

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petition. Thus, the Indiana court seems offended at what it takes to be the Supreme Court's suggestion that any and all sterilzation petitions should be dismissed on the merits.

> It goes without saying, of course, that if a court of general jurisdicition has the jurisdiction to entertain a particular issue, it has the juridiction to decide the issue on the merits and to make a decision by either granting or denying the petition. It would be unthinkable to presume that a court has jurisdiction to entertain an issue and then require it to decide that issue in only one way, that being to deny it.

Id. at 976. It is submitted that the United States Supreme Court was not indulging in any "unthinkable presumption," but rather interpreting the facts of *A.L. v. G.R.H.* to present a case where denial of a petition for sterilization would be appropriate as a matter of law.

[86]*See* Ind. Code §§ 33-6-1-2, 33-10.1-2-3.1 to -5, 33-10.5-3-1 (1982).

[87]For example, the Municipal Court of Marion County has jurisdiction in civil cases only where the action is founded in contract or tort and the value sought to be recovered is no more than $12,500. *Id.* § 33-6-1-2. A city court has civil jurisdiction only if the amount in controversy does not exceed $500, with the proviso that the court does not have the power to hear "actions for slander, libel, foreclosure of mortgage on real estate, where the title to real estate is in issue, matters relating to a decedent's estate, appointment of guardians and all related matters, and actions in equity." *Id.* § 33-10.1-2-3.1. The county courts' jurisdiction in civil matters is limited to

primarily with the probate courts in Indiana.[88] Thus, it may appear that these courts are the proper forum to consider requests for sterilization, but sterilization is sufficiently different from the matters normally considered by these courts[89] to make the placement of jurisdiction with them less than ideal.

The probate courts have authority to appoint guardians to take responsibility for the estates of incompetent persons and to appoint guardians over the person of the incompetent under Indiana Code section 29-1-18-4.[90]

1. Guardianships over the Estate of Incompetents.—The concerns involved in control of the estate of a person are sufficiently different from those involved in the control of an individual's personal rights to warrant a conclusion that this jurisdiction does not confer the power to authorize sterilization. Guardianship over the estate of an incompetent concerns fiduciary and financial matters. The emphasis is upon property rights rather than upon civil rights.[91] The care and wise investment of property obviously has little to do with the protection of personal rights that must be considered in determining whether an incompetent should be sterilized.

2. Guardianships over the Person of Incompetents.—The considerations involved in guardianships over the person closely parallel those involved in sterilization petitions. A guardian over the person is responsible for seeing that the incompetent entrusted to his care and supervision is properly educated and maintained.[92] These duties have

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actions founded in contract or tort where the amount in controversy does not exceed $3,000, to possessory actions between a landlord and tenant where the rent reserved does not exceed $500 per month, to actions for possession of property not exceeding $3,000 in value, and to cases involving a request for a surety of the peace. *Id.* § 33-10.5-3-1.

[88]*Id.* § 29-1-1-20.

[89]*See generally* IND. CODE tit. 29 (1982).

[90]IND. CODE § 29-1-18-4 (1982). This section gives the probate court authority over forms of guardianship expressly provided for in article 1 of title 29 of the Indiana Code. IND. CODE § 29-1-18-6 (1982) provides for the appointment of a guardian for the estate of any incompetent and the appointment of a guardian over the person of any incompetent except a minor who has a natural guardian who is properly performing his duties as guardian. *Id.*

[91]"It is the duty of the guardian of the estate to protect and preserve it, to invest it, . . . to account for it faithfully, . . . and, at the termination of the guardianship, to deliver the assets of the ward to the persons entitled thereto." *Id.* § 29-1-18-28(b).

[92]The guardian of the person has the duty

> to care for and maintain the ward and, if the ward is a person under eighteen (18) years of age to see that the ward is properly trained and educated and that he has the opportunity to learn a trade, occupation or profession. . . . The guardian of the person may be required to report the condition of his ward to the court. . . . The guardian of the person . . . shall not have power to bind the ward or his property.

Id. § 29-1-18-28(a).

"social overtones" and are tied to the personal rights of incompetents.[93] However, the probate court's authority to appoint guardians over the person of incompetents does not extend to minors where there exists a person with parental rights.[94] This indicates that the probate court, while accustomed to determining what may be in the best interest of incompetents in a nonadversary setting, is not regularly faced with the tasks of balancing the interests of parent and child in cases where those interests conflict. In sterilization petitions, it is especially likely that parents may try to advance their own interests instead of those of their children. This tendency was demonstrated in *Frazier v. Levi*,[95] where the parents of a thirty-four-year-old retarded woman attempted to have their daughter sterilized for social and economic reasons.[96] The undesirability of simply permitting parents or guardians to decide whether sterilization is proper was pointed out in *In re A.W.*[97] where the Colorado Supreme Court stated:

> Consent by parents to the sterilization of their mentally retarded offspring has a history of abuse which indicates that parents, at least in this limited context, cannot be presumed to have an identity of interest with their children. The inconvenience of caring for the incompetent child coupled with fears of sexual promiscuity or exploitation may lead parents to seek a solution which infringes their offspring's fundamental procreative rights.[98]

The courts in some states have placed the power to hear such petitions in their probate courts because of probate courts' historical

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[93]2B G. HENRY, THE PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA 602-03 (7th ed. 1979).

[94]IND. CODE § 29-1-18-6 (1982) provides:

> A guardian of the estate may be appointed for any incompetent. A guardian of the person may be appointed for any incompetent except a minor having a natural guardian in this state who is properly performing his duties as natural guardian or a married minor who is incompetent solely by reason of his minority.

Id.

[95]440 S.W.2d 393 (Tex. Civ. App. 1969).

[96]In *Frazier*, the plaintiff alleged

> that she is the aged mother of the ward, is in poor health and is unable to stand the physical, financial or emotional strain of caring for any more children of the ward. She and her husband are already providing for the ward and the ward's two children, both of whom are mentally retarded. The ward, age 34, has the mentality of about a six year old, is sexually promiscuous, unable to support or take care of herself or her children, but is in good physical health. No medical reason for her sexual sterilization exists ....

Id. at 393-94.

[97]637 P.2d 366 (Colo. 1981).

[98]*Id.* at 370, *quoted in* P.S. v. W.S., 443 N.E.2d 67, 70 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983).

responsibility to care for the needs of incompetents.[99] However, where the needs of incompetent *minors*, rather than the needs of incompetents generally, are concerned, it is more logical to place sterilization hearings in the juvenile court, with its traditional concern for the interests of children.

B. Juvenile Courts

Juvenile courts generally operate within circuit courts, although in some counties they are part of the superior courts.[100] However, they do not enjoy the broad jurisdictional grant given to circuit and superior courts because their jurisdictional limits are carefully spelled out in the Indiana Code.[101] In those areas where they do have jurisdiction, the jurisdiction is exclusive and original.[102]

1. Goals of the Juvenile Law System.—The Indiana General Assembly has placed the responsibility for ensuring that the needs of children are met in the juvenile courts.[103] The Juvenile Code[104] begins with a list of six goals outlining the policy and purpose of the court. Those goals pertinent to juvenile court jurisdiction over sterilization petitions are:

> (2) To provide a judicial procedure that insures fair hearings and recognizes and enforces the constitutional and other legal rights of children and their parents;
> (3) To insure that children within the juvenile justice system are treated as persons in need of care, treatment, rehabilitation, or protection;
> . . .
> (5) To strengthen family life by assisting parents to fulfill their parental obligations.[105]

a. Parens patriae.—The legislature has placed the primary responsibility for executing the parens patriae[106] doctrine for the state with the juvenile courts. One commentator explained that the goal stated in Indiana Code section 31-6-1-1(2) was inserted into the Code "to em-

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[99]*See In re* Grady, 170 N.J. Super. 908, 405 A.2d 851 (1979).

[100]*See* IND. CODE § 33-12-3-1, -2 (1982) (circuit courts generally have juvenile jurisdiction); *id.* § 33-4-6-2 (superior court has exclusive juvenile jurisdiction in Shelby County). It is common practice to assign the juvenile court jurisdiction to a particular judge or division in counties where there is more than one judge sitting at the court. This enables the juvenile judges to acquire expertise in this area.

[101]IND. CODE § 31-6-2-1 (1982).

[102]*Id.* § 31-6-2-1(a).

[103]*See generally* IND. CODE tit. 31, art. 6 (1982).

[104]IND. CODE tit. 31, art. 6 (1982).

[105]*Id.* § 31-6-1-1.

[106]" 'Parens patriae,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability." BLACK'S LAW DICTIONARY 1003 (5th ed. 1979).

phasize that *parens patriae* and due process are not incompatible."[107] Case history also shows that the parens patriae doctrine was the main force behind the development of Indiana's juvenile court system.[108] This placing of primary responsibility for the parens patriae doctrine, as it regards children, in the juvenile court supports the proposition that the juvenile divisions of circuit and superior courts are the proper forum for sterilization petitions for incompetent minors.

b. Children in need of care, treatment, and protection.— Sterilization petitions present sensitive and conflicting issues of human rights[109]—the right to procreation and the right to privacy accorded the decision not to procreate which a child would normally be able to exercise upon reaching adulthood. These rights can only be made fully available to incompetent children who need sterilization for their own protection by following a judicial procedure similar to that contemplated by the Juvenile Code. Such children should be "treated as persons in need of care, treatment . . . or protection"[110] because they need sterilization for their own physical or mental health.

Such a procedure does not call for mass sterilization of mentally disabled or retarded persons. On the contrary, most disabled persons are entitled to be free from such state interference,[111] but there are rare cases where intervention is necessary. This was pointed out by Dr. Jane C. Perrin, who conducted a three-year sterilization program for mentally retarded youth using numerous criteria to determine whether sterilization was indicated.[112] Dr. Perrin, who approached decisions to sterilize with extreme caution, found tremendous success in

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[107]IND. CODE ANN. § 31-6-1-1 commentary at 15 (West 1979).

[108]This was explained in State *ex rel.* Johnson v. White, 225 Ind. 602, 77 N.E.2d 298 (1948):

> The history of juvenile jurisdiction reveals that the state assumed this authority as *parens patriae* for the welfare of all infants.
>
> "Under the ancient common law, the king, as *parens patria*, [sic] was deemed to have charge of all persons who, by reason of their youth and inexperience, were unable to care for themselves, or to protect their estates. In the exercise of this supervision, the chancellor, who was orginally an ecclesiastic, and the keeper of the king's conscience, was the guardian of all infants. . . ."
>
> The State of Indiana acting by its General Assembly, has continued and extended this jurisdiction under the various juvenile acts.

Id. at 608, 77 N.E.2d at 301 (citations omitted) (quoting Butterick v. Richardson, 39 Ore. 246, 247, 64 P. 390, 391 (1901)).

[109]Regarding state authority to sterilize, the United States Supreme Court in Skinner v. Oklahoma, 316 U.S. 535 (1942), stated that "[t]his case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring." *Id.* at 536.

[110]IND. CODE § 31-6-1-1(3) (1982).

[111]For a discussion of the reasons why court interference in this area may be frowned upon, see Comment, *Sterilization, Retardation, and Parental Authority*, 1978 B.Y.U. L. REV. 380, 396-97.

[112]Perrin, *supra* note 30, at 288.

the cases where physicians and families agreed that sterilization was appropriate. In Dr. Perrin's program nineteen females and one male were sterilized, and ten requests for sterilization were denied.[113] At the end of the program, Dr. Perrin concluded that sterilization services were medically beneficial in cases of "persons with an IQ below 50, or whose retardation is complicated by severe emotional or physical handicaps."[114] She proposed that the following guidelines be used to determine if sterilization is medically indicated:

> 1. Parental request and informed consent for sterilization of mentally retarded offspring could be evaluated by a professional and lay group for generation of medical, psychological, social, behavioral, and genetic data on the patient, and determination that the interests of the consenting parent or guardian coincide with those of the retarded person.
>
> 2. Criteria for consideration of sterilization could be set, including level of IQ and type and severity of the complicating conditions of marked physical disability, substantial emotional-behavioral disturbance, and high-risk, untreatable genetic disease.
>
> 3. A prompt court hearing could be held with legal counsel for the retarded person and for the parent, the court having authority to grant or withhold permission for sterilization.[115]

Such a sensitive approach to the problem of sterilization of incompetent minors would promote the goal of the juvenile court system of providing children in need with proper care, treatment, and protection.

c. Strengthening family life.—The final goal of the juvenile statute pertinent to sterilization issues—strengthening family life[116]—could also be met by permitting the juvenile courts to hear petitions for sterilization. Prior court decisions have precluded families with children who suffer from conditions that render them proper candidates for sterilization from consenting to sterilization of their children without court intervention.[117] The parents may feel helpless to improve the lives of their children because they cannot do what they think is best. The Juvenile Code's goal of strengthening "family life by assisting parents to fulfill their parental obligations"[118] would be met by giving the parents a method by which they could obtain authorization to have

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[113] *Id.* at 288.

[114] *Id.* at 290.

[115] *Id.*

[116] IND. CODE § 31-6-1-1(5) (1982).

[117] P.S. v. W.S., 443 N.E.2d 67 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501 (1975), *cert. denied*, 425 U.S. 936 (1976).

[118] IND. CODE § 31-6-1-1(5) (1982).

their children sterilized in proper cases. Allowing parents to participate in decisions affecting their children would strengthen the family unit. Clearly defining the court with authority to hear sterilization petitions involving minors would make the appropriate procedure readily available to parents and give them a much-needed feeling of responsibility. In addition, the proceedings of the juvenile court are especially designed to deal sensitively with possible parent-child conflicts, further giving mothers and fathers positive feelings about their parental roles.

2. Jurisdictional Requirements.—The jurisdictional statute for juvenile courts provides eight possible bases for exclusive original jurisdiction.[119] Four of these might provide the necessary jurisdictional grant for sterilization petitions:

> (2) Proceedings in which a child, including a child of divorced parents, is alleged to be a child in need of services (IC 31-6-4).
>
> . . . .
>
> (5) Proceedings governing the participation of a parent, guardian, or custodian in a program of care, treatment, or rehabilitation for a child (IC 31-6-4-17).
>
> . . . .
>
> (7) Proceedings to issue a protective order (IC 31-6-7-14).
>
> (8) Other proceedings specified by law.[120]

Because these jurisdictional bases are alternative rather than conjunctive, children needing sterilization need to meet only one of these jurisdictional bases in order for the juvenile court to have exclusive power to hear their petitions.

a. Children in need of services.—Children who ought to be sterilized appear to fall under subsection two of the jurisdictional section[121] in that they are children in need of services (CHINS). The Indiana CHINS statute[122] supports this view. The statute declares that a minor is a child in need of services if:

> (1) his physical or mental condition is seriously impaired or seriously endangered as a result of the inability, refusal, or neglect of his parent, guardian or custodian to supply the child with necessary food, clothing, shelter, medical care, education, or supervision;
>
> . . .

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[119] *Id.* § 31-6-2-1(a).

[120] *Id.*

[121] *Id.* § 31-6-2-1(a)(2).

[122] *Id.* § 31-6-4-1 to -19.

> (6) he substantially endangers his own health or the health of another;
>
> and needs care, treatment, or rehabilitation that he is not receiving, and that is unlikely to be provided or accepted without the coercive intervention of the court.[123]

Some children need sterilization to prevent their physical and/or mental health from being seriously endangered or impaired. Indiana, it appears, has ruled that parents may not have sterilization procedures performed upon their children without a court order,[124] thus making parents legally unable to provide their offspring with this type of treatment. Consequently, the physical or mental condition of such children is seriously endangered *as a result* of the parents' inability to supply needed medical procedures. The causative inability is legal rather than financial in nature, but it is a very real obstacle and makes it unlikely that the necessary treatment will be provided without court intervention. The statute requires that court intervention be "coercive" before a child can qualify for classification as a CHINS.[125] Admittedly, most parents of children needing sterilization would not need to be coerced into permitting the proper surgical procedures; however, in the wake of *P.S. v. W.S.*, it is likely that medical personnel would require the coercion of a court order before they would perform sterilization procedures upon an incompetent minor. Therefore, disabled children who are proper candidates for sterilization could be classified as CHINS.

In order to determine whether an effort should be made to have such children declared CHINS, the remedies available under the CHINS statute should be examined to see if a sterilization could be ordered. The statute provides that the court may "order the child to receive out-patient treatment at a social service agency, psychological, psychiatric, medical, or educational facility, or from an individual practitioner."[126] This suggests that the court can order sterilization only if it can be done on an outpatient basis because "[t]he express mention of one person or thing is the exclusion of another. . . . What is expressed makes what is silent to cease."[127] However, the statute does not define "outpatient." In Webster's New Collegiate Dictionary the term is defined as "a patient who is not an inmate

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[123]*Id.* § 31-6-4-3.

[124]*See* P.S. v. W.S., 452 N.E.2d 969 (Ind. 1983); A.L. v. G.R.H., 163 Ind. App. 636, 325 N.E.2d 501 (1975), *cert. denied*, 425 U.S. 936 (1976). *See infra* note 151.

[125]IND. CODE § 31-6-4-3(a) (1982).

[126]*Id.* § 31-6-4-15.4(1) (Supp. 1983).

[127]Shupe v. Bell, 127 Ind. App. 292, 298, 141 N.E.2d 351, 354 (1957) (quoting WHARTON'S LEGAL MAXIMS 11 and Woodford v. Hamilton, 139 Ind. 481, 39 N.E. 47 (1894), respectively).

of a hopsital but who visits a clinic or dispensary connected with it for diagnosis or treatment."[128] To date, there are no Indiana cases interpreting what "outpatient basis" means, but cross references in the statute[129] indicate that the legislature inserted this term because it did not want the juvenile court to have responsibility for commitment proceedings. The power to commit mentally ill children to institutions lies in the probate courts, not the juvenile courts.[130] Provided that long-term hospital placement is not required, a sterilization procedure may be ordered under the CHINS statute. A hospital stay of a few days would be more traumatic to these children than a stay of a few hours, but it could still be classified as a visit rather than a residency; therefore, it should not be precluded by the "outpatient" requirement of the CHINS statute.

The procedural steps that a parent would have to utilize in order to have his child declared a CHINS for the sole purpose of authorizing a sterilization operation are cumbersome, but not unworkable. The statute does not permit the parents to file a petition themselves in order to achieve this purpose; it requires the filing to be done by either the prosecutor or the attorney for the county department.[131] It might be argued that because the statute provides that the prosecutor or county attorney may file a request for authorization to file a petition alleging that a child is a CHINS,[132] others are not precluded from this act; otherwise the legislature would have said *only* the prosecutor or the county attorney. However, this reasoning would not pass muster because the statute later provides that the petition "must be signed and filed by the person representing the interests of the state."[133] This might indicate that the legislature did not contemplate use of this mechanism in cases where parents wish to make specific services available to their children. However, that does not mean that the General Assembly wished to refuse use of the CHINS statute under such circumstances; more likely, it was something that was never considered. The statute does not preclude parents from asking the juvenile authorities to secure authorization to have their incompetent child sterilized; this requirement merely provides additional safeguards to ensure that sterilization petitions are not granted lightly. The procedure could be compared to the requirement that criminal victims who want to see their attackers prosecuted must rely upon county authorities to pursue the matter in criminal courts.

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[128]WEBSTER'S NEW COLLEGIATE DICTIONARY 815 (1976).

[129]IND. CODE § 31-6-4-16(c) (1982) directs the court to refer a child needing commitment proceedings under sections 16-14-9.1-1 to -18 to the probate courts.

[130]*See supra* note 129.

[131]IND. CODE § 31-6-4-10 (1982).

[132]*Id.* § 31-6-4-10(a).

[133]*Id.* § 31-6-4-10(c).

Indiana has declared that if the procedural requirements under the juvenile statute are not properly followed, there is no jurisdiction.[134] Therefore, in order to request the court to order sterilization under the CHINS statute, the parents must approach an intake officer and explain why their child needs to be sterilized.[135] The intake officer would decide whether the child is a CHINS and prepare a report containing his finding. This report would be given to the prosecutor or the county attorney who may then ask the court for authorization to file a petition alleging that the child is a CHINS. If either decides not to petition the court, the parents may still plead their case before the other. Thus, there are five requirements before jurisdiction attaches in a CHINS case:

1. written intake information signed by the person giving the information or by the intake officer; . . .
2. the report of preliminary inquiry;
3. request from prosecutor or attorney for the department of public welfare for authorization to file a petition;
4. the order of the juvenile court authorizing the filing of the petition; and
5. petition alleging the child is a child in need of services.[136]

If the above procedures are followed, a petition to authorize sterilization of an incompetent minor could be considered by a juvenile court.

b. Parental participation proceedings.—The second possible basis of juvenile court jurisdiction for sterilization orders—"proceedings governing the participation of a parent, guardian or custodian in a

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[134]Several cases decided under the predecessor to Indiana's CHINS statute held that preliminary procedural steps required by statute are jurisdictional. "[T]he exclusive original jurisdiction may only be obtained by the juvenile court as set forth above and unless such . . . procedural steps are taken there is no jurisdiction established." Summers v. State, 248 Ind. 551, 556-57, 230 N.E.2d 320, 323 (1967). *Accord* Shupe v. Bell, 127 Ind. App. 292, 300-01, 141 N.E.2d 351, 355 (1957) ("[T]he Juvenile Court cannot acquire jurisdiction . . . unless the petition . . . is filed by the Probation Officer of the Court under an order of the court authorizing the same."); *In re* Rosenbarger, 127 Ind. App. 497, 153 N.E.2d 619 (1957) (no jurisdiction where the petition was not signed by the probation officer as required by statute). *Contra* Hogg v. Peterson, 245 Ind. 515, 198 N.E.2d 767 (1964):

> We do not believe that a statute authorizing the filing of a petition in such informal proceedings by the probation officer should necessarily be construed to be jurisdictional and to forbid the filing of a petition by anyone else. It is more logical to consider such requirements as merely directory and that errors with reference to such matters are waived unless seasonably brought to the attention of the trial court.

Id. at 518-19, 198 N.E.2d at 769.

[135]*See* IND. CODE § 31-6-4-8 (1982).

[136]BENCHBOOK COMMITTEE OF THE INDIANA COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, JUVENILE JUSTICE BENCHBOOK FOR INDIANA JUDGES C-2.01 (2d ed. 1980).

program of care, treatment, or rehabilitation"[137]—does not confer the independent jurisdiction sought because the statute provides that this jurisdiction only attaches in proceedings for CHINS or delinquent children.[138] In addition, the jurisdiction is aimed at parents who must be forced or coerced into participating in programs for their children, which would seldom be the situation in sterilization cases. The provision creating this type of jurisdiction points out the juvenile division's competence in balancing competing interests between parent and child, but it does not confer jurisdiction in sterilization cases.

c. Protective order proceedings.—The third possible basis of juvenile court jurisdiction for sterilization orders—"proceedings to issue a protective order"[139]—presents a more expedient procedure for parents than use of the CHINS statute, but does not provide children with as many inherent procedural protections. The statute provides:

> Upon its own motion or upon the motion of the child, the child's parent, guardian, custodian, or guardian ad litem . . . the juvenile court may, for good cause shown upon the record issue an injunction:
> (1) to control the conduct of any person in relation to the child;
> (2) to provide a child with an examination or treatment under IC 31-6-7-12.[140]

The court could "control the conduct of" specified medical and hospital personnel by requiring them to perform the requested sterilization since to control a person's conduct is to "exercise restraining *or directing* influence over"[141] that person's conduct. The supreme court in *P.S. v. W.S.*[142] did not list a statutory section of the juvenile code to support its finding of jurisdiction; however, the court of appeals[143] found that the trial court's authority to hear the child's request for an injunction against a sterilization procedure lay in this provision.[144] The court of appeals did not state that this subsection also covered parents' petitions to authorize sterilizations, but its result leads to that conclusion. As the supreme court stated:

> It goes without saying, of course, that if a court of general jurisdiction has the jurisdiction to entertain a particular issue, it has the jurisdiction to decide the issue on the merits and

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[137]IND. CODE § 31-6-2-1(a)(5) (1982).
[138]*Id.* § 31-6-4-17.
[139]*Id.* § 31-6-2-1(a)(7).
[140]*Id.* § 31-6-7-14(a).
[141]WEBSTER'S NEW COLLEGIATE DICTIONARY 247 (1976).
[142]452 N.E.2d 969 (Ind. 1983).
[143]443 N.E.2d 67 (Ind. Ct. App. 1982), *vacated*, 452 N.E.2d 969 (Ind. 1983).
[144]443 N.E.2d at 71.

> to make a decision by either granting or denying the petition. It would be unthinkable to presume that a court has jurisdiction to entertain an issue and then require it to decide that issue in only one way, that being to deny it.[145]

If the power to stop sterilization lies in this clause, then the power to permit sterilizations must also be present. Injunctive relief has both negative and positive meanings, and jurisdiction cannot be made to depend upon whether the petitioning party wants to proceed with a particular action or to stop it.

This portion of the juvenile code also specifically addresses the medical treatment issue by providing for an injunction "to provide a child with an examination or treatment under IC 31-6-7-12."[146] Indiana Code section 31-6-7-12, however, carefully limits use of the injunction to the following situations: 1) where a petition has been filed seeking to have a child declared a CHINS; 2) where a petition has been filed seeking to have a child declared a delinquent child; or 3) where an emergency exists.[147] Consequently, in the absence of a CHINS petition, a court would only have jurisdiction to authorize a sterilization if the need were so severe that it could be categorized as an emergency. Given P.S.'s self-destructive habits, her need for sterilization could have been considered an emergency, but obviously such a classification would not be available in all situations where sterilization is medically called for. Therefore, this basis of jurisdiction could be used in especially severe cases, but not in all cases where a court order for sterilization would be proper.

d. Other proceedings provided by law.—Finally, the Juvenile Code gives the juvenile court exclusive original jurisdiction over "other proceedings specified by law."[148] As indicated earlier, Indiana recognizes that "law" may stem from many different sources;[149] one of those sources is case law, which would encompass the holding of *P.S. v. W.S.*[150] Sterilization petitions could be brought before the juvenile court under this jurisdictional grant because *P.S. v. W.S.* implicitly acknowledged a common law requirement of judicial authorization before sterilization can be performed upon incompetents.[151] Therefore, proceedings to consider petitions to sterilize incompetent minors constitute "other proceedings provided by law."[152]

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[145]452 N.E.2d at 976.

[146]IND. CODE § 31-6-7-14(a)(2) (1982).

[147]*See id.* § 31-6-7-12(a).

[148]*Id.* § 31-6-2-1(a)(8).

[149]*See supra* note 43 and accompanying text.

[150]452 N.E.2d 969 (Ind. 1983).

[151]*Id.* In holding that juvenile courts may authorize sterilizations of incompetent minors, the court by implication held that judicial authorization is a prerequisite to sterilization procedures upon such minors.

[152]IND. CODE § 31-6-2-1(a)(8) (1982).

VII. CONCLUSION

In order to protect all of the constitutional rights of incompetent minors, at least one court must be able to authorize their sterilization when it is shown evidence that such a procedure would be in the child's best interests. The power to hear such petitions should be vested exclusively in the juvenile courts in Indiana because these courts are accustomed to balancing the interests of parents and children in areas where their interests may conflict. The Juvenile Code has three alternative jurisdictional bases which should be interpreted to give the juvenile courts the exclusive authority to hear petitions for the sterilization of incompetent minors: 1) the CHINS statute, which gives the juvenile court power to order appropriate medical care for a child in need of services, 2) the injunction power to issue protective orders for children under emergency situtations or where a petition has been filed to declare a child a CHINS, and 3) the grant of jurisdiction over any other proceeding specified by law. Therefore, the circuit and superior courts, sitting in their capacity as circuit and superior courts and exercising their general jurisdiction powers, should not have the authority to hear sterilization petitions involving minors. Such authority should rest exclusively in the juvenile courts.

DONNA J. BAYS-BEINART

Sealed Judicial Records and Infant Doe: A Proposal to Protect the Public's Right of Access

"A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both.... A people who mean to be their own Governors, must arm themselves with the power which knowledge gives."[1]

I. INTRODUCTION

In the Spring of 1982, the rights of critically ill infants became the center of a public controversy when the Indiana courts decided the *Infant Doe* case.[2] The case involved court rulings that permitted the parents of an infant suffering from multiple congenital defects to withhold medical treatment, thus allowing the infant to die.[3] The public was denied access to information about this controversial case when, on appeal, the Indiana Court of Appeals sealed all judicial records dealing with *Infant Doe*.[4] Closure of both the lower court hearings and the appellate court records was apparently requested to protect the privacy of the infant's parents.[5] The closure order withheld from public view the courts' analysis of the controversial and unsettled legal issues surrounding passive euthanasia of radically defective infants.[6] *Infant Doe*, therefore, cannot provide standards for hospitals,

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[1]9 THE WRITINGS OF JAMES MADISON 103 (Hunt ed. 1910), *quoted in* United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[2]Because all judicial records concerning the *Infant Doe* case were sealed and no opinion was published, neither a docket number nor a citation to the case is available.

[3]In April, 1982 "Infant Doe" was born with Down's syndrome, a tracheal-esophageal fistula, and heart and intestinal disorders, in Bloomington, Indiana. After consulting with doctors, the infant's parents decided to let the infant die and refused intravenous feeding and surgery. The Monroe County Prosecutor intervened, and sought a court ruling ordering treatment for the infant. Indianapolis Star, Apr. 27, 1982, at 1, col. 4. For the Indiana Code sections giving the Prosecutor authority to intervene, see *infra* note 6. After several hearings, the Monroe County Circuit Court upheld the parents' decision. An emergency appeal was taken, and the Indiana Supreme Court summarily affirmed without issuing a written opinion. The infant died before a planned appeal reached the United States Supreme Court. Bloomington Hearld Telephone, Apr. 17, 1982, at 1, col. 4; J. ROBERTSON, THE RIGHTS OF THE CRITICALLY ILL 88 (1983).

[4]After "Infant Doe's" death, the Monroe County Prosecutor appealed to the Indiana Court of Appeals, asking the court to review the legality of the parents' action. Indianapolis Star, Dec. 8, 1982, at 24, col. 1.

[5]Bloomington Herald Telephone, Apr. 15, 1982, at 1, col. 1.

[6]*See generally* Ellis, *Letting Defective Babies Die: Who Decides*, 7 AM. J.L. & MED. 393 (1982); Kluge, *The Euthanasia of Radically Defective Neonates: Some Statutory*

doctors, and parents to follow when they are faced with similar situations. The closure order also forced the Indiana Legislature to attempt to draft legislation responsive to *Infant Doe* without complete information about the case.[7] Additionally, because the court records are sealed and no opinion was issued, *Infant Doe* offers no guidance to the courts in subsequent similar cases. The *Infant Doe* case, therefore, demonstrates that sealing court records adversely affects the public and the legislative and judicial branches of government.

United States courts have long recognized that the public has a right of access to judicial records.[8] Some courts describe the right of access as based on the common law, and others find that the right is protected by the United States Constitution.[9] Under either view, the courts' commitment to the right of access is founded on the belief that limiting public access to governmental records, including judicial records, is repugnant to the democratic principles of self-government.[10] The right of access to judicial records is also closely related to the long-standing Anglo-American tenet that justice should be conducted openly with the public present at judicial proceedings.[11]

Considerations, 6 DALHOUSIE L.J. 229 (1980). The judge who first ruled that the parents had a right to choose to withhold medical treatment said "no specific law can be cited, only the [common] law that the parents have a right to exercise jurisdiction over the care of their children." Bloomington Herald Telephone, Apr. 16, 1982, at 1, col. 1. *But see* IND. CODE §§ 35-46-1-4 (1982) (neglect of a dependent); 35-46-1-5 (nonsupport of a dependent child); 35-46-1-1 (defining support to include medical care).

[7]In 1983 the Indiana Legislature amended IND. CODE § 31-6-4-3 (1982) to add handicapped children to the definition of "children in need of services." The amendment reads, in part:

> (f) A child in need of services under subsection (a) includes a handicapped child who is deprived of nutrition that is necessary to sustain life, or who is deprived of medical or surgical intervention that is necessary to remedy or ameliorate a life threatening medical condition, if the nutrition or medical or surgical intervention is generally provided to similarly situated handicapped or nonhandicapped children.
>
> (g) A handicapped child under subsection (f) is an individual under eighteen (18) years of age who has a handicap as defined in IC 22-9-1-3(q).

Act of Apr. 19, 1983, Pub. L. No. 288, § 1, 1983 Ind. Acts 1783, 1784-85 (codified at IND. CODE § 31-6-4-3 (Supp. 1983)).

[8]*See, e.g.*, Nash v. Lathrop, 142 Mass. 29, 35, 6 N.E. 559, 560 (1886) (acknowledging in dictum that the public had a right of access to the opinions of the Massachusetts Supreme Judicial Court); *Ex parte* Drawbaugh, 2 App. D.C. 404 (1894) (court refused to seal the court records in a patent case).

[9]*See infra* text accompanying notes 84-142.

[10]United States v. Mitchell, 551 F.2d 1252, 1257-58 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); Jensen v. Jensen, 103 Misc. 2d 49, 425 N.Y.S.2d 208 (N.Y. Sup. Ct. 1980).

[11]*See infra* notes 24-25 and accompanying text. *See also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings and Records*, 52 TEMP. L.Q. 311 (1979).

In spite of the long acceptance of the right of public access to judicial records, American courts have not clearly defined the contours of the right.[12] A court generally permits any member of the public to inspect records within the court's custody.[13] Exercise of the right of access is not conditioned either upon a proprietary interest in the record sought or upon a showing of need for the record as evidence in a lawsuit.[14] Nevertheless, when faced with a conflict between the right of access and other interests that may be impaired by public exposure, courts occasionally limit access to their records.[15] The courts, however, have not provided clear standards for limiting public access to judicial records.[16] Several reasons for the lack of clear standards can be identified. First, although the courts agree that the right of access exists, they have different views about the source of the right. A court finding that the right of access is a constitutional right may be less willing to limit public access than a court finding that the right originates in the common law.[17] Second, the nature of the interests the courts seek to protect by limiting access affects the decision to limit or allow public access.[18] Courts have also used different methods to limit public access without saying why one method is more appropriate than another in a particular case.[19] Finally, the

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[12]Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

[13]*Id.* at 614 n.1 (Stevens, J., dissenting).

[14]*Id.* at 597.

[15]For example, courts have limited public access to judicial records to protect privacy interests, *see In re* Caswell, 18 R.I. 835, 29 A. 259 (1893); *accord* C. v. C., 320 A.2d 717, 722-23 (Del. 1974), the right to a fair trial, *see* United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981), and trade secrets, *see* Centurion Indus., Inc. v. Warren Steurer, 665 F.2d 323 (10th Cir. 1981); Covey Oil Co. v. Continental Oil Co., 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); American Dirigold Corp. v. Dirigold Metals Corp., 104 F.2d 863 (6th Cir. 1939). *See also supra* note 71.

[16]Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978).

[17]*Compare* Miami Herald Publishing Co. v. Chappell, 403 So. 2d 1342, 1345 (Fla. Dist. Ct. App. 1981) (holding that the public's first amendment right of access to the judicial proceedings and records of criminal cases can only be limited if "closure is necessary to prevent a serious and imminent threat to the administration of justice" and "no less restrictive alternative measure is available") *with* Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 434 (5th Cir. 1981) (reviewing a denial of broadcasters' requests to copy tapes admitted into evidence during a criminal trial, the court found a common law right of access and stated that there is "no basis from which one can derive the overpowering presumption in favor of access discovered by [other courts]").

[18]*See supra* note 15.

[19]Public access to judicial records may be limited by sealing the records, *see* Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977); Munzer v. Blaisdell, 268 A.D. 9, 48 N.Y.S.2d 355 (1944), or by less severe methods including the use of pseudonyms, *see* United States v. Doe, 496 F. Supp. 650 (D.R.I. 1980), the deletion of names, *e.g.*, Krause v. Rhodes, 671 F.2d 212 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 54 (1982), or the deletion of particular pieces of evidence from the records, *see* Centurion Indus., Inc. v. Warren Steurer, 665 F.2d 323 (10th Cir. 1981).

courts apply different criteria for limiting public access depending upon the type of judicial record involved.[20] The uncertain standards regarding limits on public access to judicial records, combined with a complete denial of public access in a case like *Infant Doe*, which involves controversial and unsettled legal issues, emphasizes the need for a clear and uniform procedure for courts to follow when deciding questions of public access.

This Note will examine the source of the public's right of access to judicial records by discussing the accepted common law source of the right and by exploring the possibility of a constitutional basis for the right. The scope of the right of public access will be probed by examining the balancing process courts use when faced with a conflict between the right of access and other interests. Finally, a procedure will be suggested for courts to follow when deciding which limits on public access to judicial records are justified.

II. The Source of the Right of Access to Judicial Records

A. The Common Law Source

American courts do not agree about the source of the public's right of access to judicial records. Although many courts acknowledge a common law right of public access to judicial records,[21] some courts suggest that the right of access is implied by first amendment guarantees.[22] The courts have recognized that the public's common law right of access to judicial records pre-dates the United States Constitution.[23] Underlying the courts' commitment to the common law right of access is the distrust of secretly administered justice that led to the abolition of English inquisitorial courts.[24] Exposing judicial

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[20]The term judicial records may refer to judges' opinions, *see* Lowenschuss v. West Publishing Co., 542 F.2d 180 (3d Cir. 1976), evidence, *see* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978), discovery material, *see* Krause v. Rhodes, 671 F.2d 212 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 54 (1982), pleadings, *see* Sanford v. Boston Herald Traveler Corp., 61 N.E.2d 5 (Mass. 1945); Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977), or the entire court file, *see* C. v. C., 320 A.2d 717 (Del. 1974).

[21]*See infra* notes 23-36 and accompanying text.

[22]*See e.g.*, Krause v. Rhodes, 671 F.2d 212 (6th Cir. 1982), *cert. denied*, 103 S. Ct. 54 (1982); Miami Herald Publishing Co. v. Chappell, 403 So. 2d 1342 (Fla. Dist. Ct. App. 1981).

[23]United States v. Mitchell, 551 F.2d 1252, 1260 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). *Accord* Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981); United States v. Burka, 289 A.2d 376, 379 (D.C. 1972); *see also* Banks v. West Publishing Co., 27 F. 50, 59 (C.C.D. Minn. 1886).

[24]The Courts of Star Chamber, Chivalry and High Commission compelled self incrimination and handed out harsh punishment when the king's arbitrary proclama-

records to public view helps to " 'safeguard against any attempt to employ our courts as instruments of persecution.' "[25] The historical significance of the common law right of access has also been discussed as a function of the public's ownership of the law in a democratic system where "the law derives its authority from the consent of the public."[26]

Courts also recognize that justice and sound public policy require that the general public have convenient access to judicial decisions in a system that presumes and requires that each person knows the law.[27] As early as 1888, the United States Supreme Court held that a state could not prohibit an unofficial reporting service from copying and publishing the written opinions of state judges because "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute."[28]

The right of access to judicial records also serves an important function in a common law system based on the principle of stare decisis. The American legal system is a mixture of common law and statutory law. Within this system, judges declare and construe the law each time they decide a particular case; each case then has precedential force in subsequent similar cases.[29] By requiring precedents to be regarded as guiding principles in future cases, the doctrine of stare decisis promotes uniformity and continuity in the law and removes the capricious element from judicial decisionmaking.[30] When access to judicial records is denied, the decisions embodied in those records are not available for future use and have no precedential value. A legal system based upon the principle of stare decisis

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tions were disobeyed. The excesses of these courts led to their abolition in the sixteenth century. F. MAITLAND & F. MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY 103-28 (1978). *See also* A. HARDING, A SOCIAL HISTORY OF ENGLISH LAW (1973).

[25]United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (quoting *In re* Oliver, 333 U.S. 237, 270 (1948)), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); United States v. Burka, 289 A.2d 376, 379 (D.C. 1972) (quoting Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83, 91 (Cal. Ct. App. 1968)). *See also* Richmond Newspapers, Inc. v. Virginia, 488 U.S. 555, 564-73 (1980) (historical and contemporary significance of open criminal trials).

[26]Building Officials & Code Admin. v. Code Tech., Inc., 628 F.2d 730, 734 (1st Cir. 1980).

[27]Nash v. Lathrop, 142 Mass. 29, 35, 6 N.E. 559, 560 (1886). *See also* Banks v. Manchester, 128 U.S. 244, 253 (1888); Connecticut v. Gould, 34 F. 319 (N.D.N.Y. 1888); Banks v. West Publishing Co., 27 F. 50, 57 (C.C.D. Minn. 1886); *Ex parte* Brown, 166 Ind. 593, 612, 78 N.E. 553, 559 (1906).

[28]Banks v. Manchester, 128 U.S. 244, 253 (1888).

[29]Lowenschuss v. West Publishing Co., 542 F.2d 180, 185 (3d Cir. 1976).

[30]People v. Hobson, 348 N.E.2d 894, 900-01, 384 N.Y.S.2d 419, 427 (1976). *See also* Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949).

cannot function effectively unless lawyers and courts have ready access to relevant decisions.[31]

The common law right of access to judicial records also allows the public to scrutinize judicial decisionmaking. Public scrutiny of the decisionmaking process helps prevent abuses of judicial authority[32] and may decrease the chance that litigation will be conducted in an improper manner.[33] Public access to judicial records also promotes confidence in the judicial system by allowing the public to scrutinize the competence and impartiality of judicial decisionmaking.[34] Finally, by permitting the public to know how courts function in individual cases, public access to judicial records helps produce an informed and enlightened public.[35]

As demonstrated above, many courts recognize that the public has a common law right of access to judicial records. Although the right has long been acknowledged, "[t]his common law right is not some arcane relic of ancient English law."[36] The democratic principles of open justice and enlightened self-government that underlie the right of access are vital principles in the American legal system. Furthermore, the public's need for access to judicial opinions and the important functions served by public scrutiny of judicial decisionmaking demonstrate the contemporary significance of the common law right of access.

B. Constitutional Source

The Supreme Court has not often addressed the issue of the source of the right of public access. The most recent case in which the Court directly examined this issue was *Nixon v. Warner Communications, Inc.*,[37] decided in 1978. In *Warner Communications*, the Court, in dicta, expressly recognized a common law right of public access to judicial records[38] and apparently rejected the possibility of a constitutional right of public access.[39] The Supreme Court has not again addressed

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[31]Lowenschuss v. West Publishing Co., 542 F.2d 180, 185 (3d Cir. 1976). *Accord Ex parte* Brown, 166 Ind. 593, 612, 78 N.E. 553, 559 (1906).

[32]*See supra* notes 24-25 and accompanying text.

[33]Jensen v. Jensen, 103 Misc. 2d 49, 51, 425 N.Y.S.2d 208, 209 (N.Y. Sup. Ct. 1980).

[34]United States v. Burka, 289 A.2d 376, 379 (D.C. 1972) (quoting Oxnard Publishing Co. v. Superior Court, 68 Cal. Rptr. 83, 91 (Cal. Ct. App. 1968)).

[35]United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976) (quoting Grosjean v. American Press Co., 297 U.S. 233, 247 (1936)), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[36]United States v. Mitchell, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[37]435 U.S. at 589 (1978) (dicta).

[38]*Id.* at 597.

[39]*Id.* at 608.

the issue of the source of the right of access, except by implication in *Richmond Newspapers, Inc. v. Virginia*[40] decided in 1980.

In *Warner Communications*, the Supreme Court addressed the issue of whether a federal district court should allow broadcasting companies to copy tapes that were admitted into evidence during a public session of the Watergate trial.[41] At the trial court level, the broadcasters petitioned the district court for permission to copy and broadcast the tapes that were played for the jury in the courtroom. The district court found that public broadcast of the tapes prior to a resolution of the Watergate defendants' appeals might prejudice the defendants' right to a fair trial. The court therefore denied the broadcasters' requests.[42]

The broadcasters appealed to the United States Court of Appeals for the District of Columbia Circuit. The appellate court reversed, emphasizing the importance of the common law right of access.[43] The

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[40]448 U.S. 555 (1980).

[41]In 1974, several individuals, including former Attorney General Mitchell and three former White House aides, were indicted for conspiring to obstruct justice by concealing the identities of the persons responsible for the Watergate break-in. Prior to trial, the Watergate Special Prosecutor subpoenaed tape recordings of conversations between Nixon and his former aides. Nixon contested the validity of the subpoena, but the Supreme Court upheld it in United States v. Nixon, 418 U.S. 683 (1974). The tapes were turned over to the district court which listened to them *in camera* and had a copy made of the admissible portions. The admissible portions were then turned over to the Special Prosecutor.

At the trial of Mitchell and the former aides most of the tapes were introduced into evidence as exhibits. During the trial, broadcasters petitioned Judge Sirica, the trial judge in the Watergate case, for permission to copy and broadcast the portions of the tapes admitted into evidence. Judge Sirica ruled that the broadcasters lacked standing to make a motion in the criminal case and ordered that the motion be converted into a separate civil action. Because Judge Sirica did not have time to consider the broadcasters' request during the Watergate trial, the civil action was referred to another district judge, Judge Gesell. Judge Gesell entered an opinion upholding the broadcasters' right to access, but because of anticipated administrative difficulties decided to withhold permission to copy the tapes until the Watergate trial had ended. United States v. Mitchell, 386 F. Supp. 639, 643 (D.D.C. 1975).

When the Watergate trial ended, Judge Gesell transferred the civil action back to Judge Sirica. Judge Sirica issued an opinion on "the narrow issue of the timing of the release" of the tapes. United States v. Mitchell, 397 F. Supp. 186, 187 (D.D.C. 1975), *rev'd*, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978). Judge Sirica found that distribution of the tapes could prejudice the Watergate defendants' rights if, on appeal, their convictions were reversed and a new trial was ordered. Judge Sirica, therefore, denied the broadcasters' requests. 397 F. Supp. at 188-89.

[42]United States v. Mitchell, 397 F. Supp. 186 (D.D.C. 1975), *rev'd*, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[43]United States v. Mitchell, 551 F.2d 1252 (D.C. Cir. 1976), *rev'd on other grounds sub nom.* Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

court described the common law right to inspect judicial records as "fundamental" to a democratic system of government, implying a constitutional basis for the right.[44] The court of appeals, however, found it unnecessary to decide whether a denial of the broadcasters' requests would infringe a constitutional right,[45] and based its decision to allow access on the public's common law right of access to judicial records.[46]

Upon former President Nixon's petition, the Supreme Court granted certiorari to review the appellate court's ruling.[47] The Supreme Court reversed the court of appeals decision and held that the issue was governed by the Presidential Recordings Act.[48] This Act was passed by Congress to provide an administrative procedure for public release of the Watergate tapes.[49] The Supreme Court rejected the broadcasters' argument that the first amendment guarantee of freedom of the press required the Court to grant their request to copy the tapes.[50] Some appellate courts have interpreted the Court's rejection of the first amendment claim in *Warner Communications* as an explicit rejection of a constitutional source for the right of public access to judicial records.[51] However, a careful reading of the Supreme Court's discussion is less conclusive than these appellate court decisions indicate.[52] In *Warner Communications*, the broadcasters claimed that the Supreme Court's decision in *Cox Broadcasting Corp. v. Cohn*[53] guaranteed the press the right to copy and publish exhibits displayed in public sessions of trials.[54] The Supreme Court rejected this argument, finding that *Cox Broadcasting* only held that courts cannot prohibit the press from publishing information contained in court records that are available to the public.[55] The Court found *Cox Broadcasting* inapplicable in *Warner Communications* because

> [t]here simply were no restrictions upon press access to, or publication of, any information in the public domain. . . . There

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[44]The court of appeals analogized the right of access to the first, fifth, sixth, and fourteenth amendments. *Id.* at 1258.

[45]551 F.2d at 1259.

[46]*Id.* at 1260.

[47]Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

[48]44 U.S.C. § 2107 (1976), *cited in Warner Communications*, 435 U.S. at 603.

[49]435 U.S. at 603.

[50]*Id.* at 608-09.

[51]*See* United States v. Edwards, 672 F.2d 1289, 1294 (7th Cir. 1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 426 (5th Cir. 1981).

[52]*See infra* notes 66 and 69.

[53]420 U.S. 469 (1975).

[54]435 U.S. at 609. In *Cox Broadcasting*, the Court struck down a state law that prohibited press publication of the names of minor rape victims revealed in open court as violative of the first amendment. 420 U.S. at 495.

[55]435 U.S. at 609.

> is no question [in *Warner Communications*] of a truncated flow of information to the public. Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying. . . . The First Amendment generally grants the press no right to information about a trial superior to that of the general public.[56]

An analysis of the Court's statement requires an understanding of the specific factual context within which it was made. The Court in *Warner Communications* addressed the right of the broadcasters to copy tapes admitted into evidence and played for the jury in a courtroom open to the public and press. The press and other spectators were furnished transcripts of the tapes that were played for the jury. The Supreme Court only held that the first amendment does not guarantee the press physical access to copy exhibits when the public and press already have access to the information contained in those exhibits.[57] The Court did not address or decide the issue presented by the complete denial of public access in the *Infant Doe* case: whether the first amendment guarantees the public the right to information contained in judicial records.

The possibility of a first amendment guarantee of public access to information contained in judicial records was raised by the Supreme Court's plurality decision in *Richmond Newspapers Inc. v. Virginia*.[58] In *Richmond Newspapers*, the Court addressed the issue of whether a Virginia trial court had the authority to grant a criminal defendant's motion to exclude the public and the press from the courtroom during his trial. The United States Supreme Court reversed the Virginia Supreme Court's decision to uphold the closure order.[59] Because the United States Supreme Court's plurality decision contained six separate opinions, the Court's reasons for the reversal are far from clear.[60] Chief Justice Burger determined that "the [public's] right to attend criminal trials is implicit in the guarantees of the First Amendment."[61] Therefore, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[62] Justice

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[56]*Id.* (emphasis in original).

[57]*See* Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 432 (5th Cir. 1981). *But see* United States v. Myers, 635 F.2d 945, 952 (2d Cir. 1980).

[58]448 U.S. 555 (1980).

[59]*Id.* at 562, 581.

[60]A dissent was also entered by Justice Rehnquist, and Justice Powell did not participate.

[61]448 U.S. at 580.

[62]*Id.* at 581.

Stevens stated that the closure order in question was unacceptable because "the First Amendment protects the public and the press from [arbitrary] abridgment of their rights of access to information about the operation of their government, including the Judicial Branch."[63] Justice Brennan, joined by Justice Marshall, also characterized the right in question in *Richmond Newspapers* as a right of "access to information" that "may at times be implied by the First Amendment."[64] Brennan outlined a structural analysis in which a first amendment claim to a right of "access to governmental information is subject to a degree of restraint dictated by the nature of the information [sought] and countervailing interests in security or confidentiality."[65]

The issue brought before the Supreme Court in *Richmond Newspapers* concerned the public's right to attend criminal trials. The Court, therefore, did not directly address the issue of whether the first amendment implies a right of access to judicial records. The concurring opinions of Justices Stevens and Brennan, however, intimate that the first amendment guarantees may be broad enough to encompass the right of access to judicial records.[66] Furthermore, both public access to trials and public access to judicial records are based on the principle that justice should be conducted openly in a democratic society.[67] Therefore, the Supreme Court's plurality decision in *Richmond Newspapers*, that the first amendment guarantees public access

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[63]*Id.* at 584 (Stevens, J., concurring).

[64]*Id.* at 586 (Brennan, J., concurring).

[65]*Id. See also* Globe Newspaper Co. v. Superior Court 457 U.S. 596 (1982) (limitations on public access to criminal trials will be examined with strict scrutiny; safeguarding the physical and psychological well-being of a minor rape victim was found to be a compelling state interest, but the statute in question was not narrowly tailored to serve the interest and could not be relied upon to justify closure of criminal trials).

[66]*See* 448 U.S. at 582-84, 584-98 (Stevens, J., Brennan, J., concurring). *Cf.* United States v. Criden, 648 F.2d 814 (3d Cir. 1981). In *Criden*, the Court of Appeals for the Third Circuit weighed competing interests examined by the district court in a factual context similar to that in *Warner Communications*. The Third Circuit found that what it termed the common law right of access to judicial records outweighed the defendant's sixth amendment right to a fair trial in the circumstances of the case. The Third Circuit emphasized that under these circumstances, there was only a possibility that access to the tapes in the district court's custody would interfere with the defendant's right to a fair trial. However, the court did not explain how a common law right can, in any situation, prevail over a constitutional right. The Third Circuit's decision in *Criden* was criticized by the Fifth Circuit in Belo Broadcasting Corp. v. Clark, 654 F.2d 423, 431 n.18 (5th Cir. 1981). *See also* Note, *The Common Law Right to Inspect and Copy Judicial Records:* In Camera *or On Camera*, 16 GA. L. REV. 659 (1982) (examines conflict in United States courts of appeals concerning proper balance of free press interest in public access and criminal defendant's fair trial rights).

[67]*See supra* notes 11, 24-25 and accompanying text.

to trials,[68] may itself suggest first amendment protection for public access to judicial records.[69]

The Supreme Court has not specifically ruled on the issue of whether a complete sealing of judicial records infringes upon a constitutional right. In *Warner Communications*, the Court only rejected the claim that the first amendment guarantees physical access to evidentiary exhibits which have been displayed in open court. The Court's decision in *Richmond Newspapers*, applies only to public access to criminal trials. *Richmond Newspapers*, therefore, suggests possibilities for finding a constitutional source for the right of access to judicial records but does not resolve the issue. The source of the right of access limits the scope of the right when it conflicts with other interests. Therefore, the uncertainty about the source of the right is, perhaps, the crux of the ambiguous standards used to limit public access. Without guidance from the Supreme Court, the courts are left to evaluate and protect the right of access on an ad hoc basis.

III. The Scope of the Right of Access to Judicial Records: An Examination of the Courts' Balancing Tests

The public generally has a right of access to judicial records without showing any special interest in or need for the information in the records.[70] Nevertheless, it is well settled that courts have the discretionary power to limit public access to judicial records when other interests conflict with the right of access.[71] Determining when

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[68]448 U.S. at 580 (opinion of Burger, C.J.). The Supreme Court noted that the considerations that mandate that the public have access to information about criminal trials are also applicable to civil cases. *Id.* at 580 n.17.

[69]In *Criden*, the Third Circuit stated:

> [T]he interests identified by the Court in *Warner Communications* as supporting the right to access [to judicial records], "the citizen's desire to keep a watchful eye on the workings of public agencies" and publication of "information concerning the operations of government," are identical to the interests identified in the subsequent decision in *Richmond Newspapers* . . . .

United States v. Criden, 648 F.2d 814, 820 (3d Cir. 1981) (citation omitted). *Cf.* Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981). In *Belo Broadcasting*, the Fifth Circuit stated: "Our reading of *Richmond Newspapers* convinces us that the holding of *Warner Communications* that the press enjoys no constitutional right of physical access to courtroom exhibits remains undisturbed. Despite a gentle suggestion perhaps to the contrary . . . ." *Id.* at 428. *See also* Note, *supra* note 66.

[70]*See supra* notes 13-14 and accompanying text.

[71]In Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), the Supreme Court stated that "[e]very court has supervisory power over its own records and files." *Id.* at 598. Courts often limit public access to records of divorce cases when court files would otherwise become "a vehicle for improper purposes." *Id. See, e.g., In re* Caswell,

limitations are appropriate, however, is sometimes difficult for the courts. In *Nixon v. Warner Communications, Inc.*,[72] the Supreme Court stated that a decision to limit the public's common law right of access to judicial records requires a balancing of various interests.[73] The Court in *Warner Communications* identified a number of interests to be weighed. Interests in favor of granting the broadcasters' requests were the increased public understanding of the Watergate situation and "the *presumption*—however gauged—in favor of public access to judicial records."[74] Interests opposing access included a number of arguments advanced by former President Nixon. Nixon argued that he had a proprietary interest in the sound of his voice, that his privacy would be infringed by public broadcast of the tapes, and that facilitation of the commercialization of the tapes by the courts would be improper.[75] The Supreme Court, however, declined to balance the various conflicting interests and relied on the Presidential Recordings Act[76] to determine the outcome.[77] It is important to note the Supreme Court's statement that except for the presence of the Presidential Recordings Act "we [the Supreme Court] normally would be faced with the task of weighing the interests advanced by the parties."[78] This statement suggests that an appellate court may reweigh competing interests advanced by the parties at the trial court level.[79] However, the Court also stated that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case."[80] The Supreme Court decision in *Warner Communications* left unanswered a number of questions regarding limits on public access to judicial records. Among these questions are: how strong is

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18 R.I. 835, 29 A. 259 (1893) (court records of divorce case should be sealed when access is sought "from mere curiosity" or "to gratify private spite or promote public scandal").

Courts also frequently seal records of defamation cases to prevent court files from becoming "reservoirs of libelous statements for press consumption." 435 U.S. at 598 (citing Park v. Detroit Free Press Co., 72 Mich. 560, 568, 40 N.W. 731, 734-35 (1888)). Similarly, courts seal their records concerning trade secret litigation to prevent the records from becoming "sources of business information that might harm a litigant's competitive standing." 435 U.S. at 598. *See also* Annot., 62 A.L.R. 2d 509 (1958). *See generally* Annot., 84 A.L.R. 3d 598 (1978).

[72]435 U.S. 589 (1978).

[73]*Id.* at 602.

[74]*Id.* (emphasis added).

[75]*Id.* at 600-01.

[76]44 U.S.C. § 2107 (1976).

[77]435 U.S. at 606-07.

[78]*Id.* at 602.

[79]*See supra* note 66.

[80]435 U.S. at 599.

the "presumption" favoring public access to judicial records;[81] what conflicting interests tip the scales in favor of denying access;[82] and what standards should appellate courts use to review decisions regarding public access.[83]

A. The Right of Access in Criminal Cases

1. Federal Courts.—Federal appellate courts are not in agreement as to the proper resolution of the questions left unanswered in *Warner Communications*. In *United States v. Myers*,[84] television networks claimed a common law right to copy and televise videotapes entered into evidence during public sessions of the Abscam trials. The Court of Appeals for the Second Circuit affirmed an order granting access to the tapes even though Myers' trial was still in progress and juries were soon to be selected for the trials of other Abscam defendants.[85] The Second Circuit acknowledged "a presumption in favor of public inspection and copying of any item entered into evidence at a public session of a trial."[86] The court found that "[o]nce the evidence has become known to the . . . public . . . through their attendance at a public session of court"[87] only the "most extraordinary" or the "most compelling" circumstances could prevent public access to the evidence.[88] The Second Circuit therefore found a very strong presumption in favor of public access, but limited the application of the presumption to evidence displayed in a courtroom open to the public.

In *Myers*, the Second Circuit balanced the public's right of access against the criminal defendant's constitutional right to a fair trial.[89] The court noted that increased public awareness of the tapes would not necessarily result in prejudiced jurors.[90] Furthermore, the defendants' exercise of rights such as voir dire examination and change of venue would adequately protect their right to a fair trial.[91] The court, therefore, held that the risk which adverse publicity posed to a fair trial was "too speculative to justify denial of the public's right to inspect and copy evidence presented in open court."[92] The court

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[81]*See infra* text accompanying notes 147-54.
[82]*See infra* text accompanying notes 155-58.
[83]*See infra* text accompanying notes 159-60.
[84]635 F.2d 945 (2d Cir. 1980).
[85]*Id.* at 947, 949.
[86]*Id.* at 952.
[87]*Id.*
[88]*Id.*
[89]*Id.* at 951.
[90]*Id.* at 953.
[91]*Id.*
[92]*Id.* at 954. The court did not explain how the protection of a common law right can ever justify even the possibility of infringing a constitutional right. *See also supra* note 66.

in *Myers* engaged in an extensive examination of the proper balance between the common law right of access and the right to a fair trial,[93] thus, indicating a willingness to reweigh the interests advanced in the district court.

In *Belo Broadcasting Corp. v. Clark*,[94] the Court of Appeals for the Fifth Circuit addressed many of the questions the Second Circuit faced in *Myers*. The Fifth Circuit reviewed district court orders denying broadcasters' requests to copy audiotapes admitted into evidence during a public session of a criminal trial. The tapes were made during the "Brilab" investigation which resulted in the indictment of four individuals.[95] The district judge denied the broadcasters' requests because public broadcast of the tapes might have made it difficult to impanel an impartial jury for the fourth defendant's trial. In *Belo Broadcasting*, the Fifth Circuit balanced the conflicting interests of the common law right of access to judicial records[96] with the criminal defendant's constitutional right to a fair trial.[97] In contrast to *Myers*, the Fifth Circuit did not begin its inquiry with a strong presumption favoring public access. Rather, the court in *Belo Broadcasting* identified the "presumption" favoring public access as only one factor to be weighed in deciding whether to allow the broadcasters to copy the tapes. The court stated that there is "no basis from which one can derive the overpowering presumption in favor of access discovered by the [Second Circuit]."[98] Purporting to follow *Warner Communications*, the Fifth Circuit reviewed the district court decision to deny access only for abuse of discretion and declined to reweigh the interests advanced by the parties in the district court.[99] Finding that "the provision to a defendant of a fair trial is a reasonable and necessary concern of the presiding judge," the court held that the district court's denial of the broadcasters' request was not an abuse of discretion.[100]

In *United States v. Edwards*,[101] the Court of Appeals for the Seventh Circuit addressed a factual situation analagous to those in *Myers* and *Belo Broadcasting*.[102] The Seventh Circuit, like the Second

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[93]635 F.2d at 951-54.

[94]654 F.2d 423 (5th Cir. 1981).

[95]The "Brilab" investigation was a Federal Bureau of Investigation "sting" operation concerned with alleged bribery in awarding state employee insurance contracts.

[96]654 F.2d at 429.

[97]*Id.* at 425.

[98]*Id.* at 434.

[99]*Id.* at 431-32.

[100]*Id.* at 431.

[101]672 F.2d 1289 (7th Cir. 1982).

[102]The Seventh Circuit addressed the issue of whether the district court erred in denying the media's requests to copy and broadcast audiotapes admitted into evidence during a public session of a criminal trial.

Circuit in *Myers*, found that "there is a strong presumption in favor of the common law right of access to judicial records."[103] The court stated, in dicta, that when the common law right of access to judicial records conflicts with a defendant's constitutional right to a fair trial, access should be denied only if "articulable facts known to the court"[104] show that "justice so requires."[105] That is, access should be denied only when necessary to ensure the defendant a fair trial. The Seventh Circuit noted that the district court did not clearly indicate what "articulable facts" led it to conclude that closure was necessary in *Edwards*. The Seventh Circuit said, "[w]e stress that it is vital for a court clearly to state the basis of its ruling, so as to permit appellate review of whether relevant factors were considered and given appropriate weight."[106] Nevertheless, the court reviewed the district court decision only for abuse of discretion and affirmed the order denying access.[107]

2. State Courts.—State courts have also examined the public's right of access to judicial records of criminal cases. In *Miami Herald Publishing Co. v. Chappell*,[108] a Florida appellate court examined the public's right of access in the context of a factual situation analagous to *Infant Doe*.[109] The Florida appellate court reviewed a trial court's decision to deny the public and press access to both a criminal pretrial competency hearing and the tapes of testimony presented during the hearing.[110] The appellate court found that the first amendment guarantees the public and the press access to criminal trials because "[i]nherent in our system of justice is a presumption of openness."[111] In the court's view, pretrial competency hearings must be open for the same reasons trials must be open.[112] Additionally, because pre-

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[103]672 F.2d at 1290.

[104]*Id.* at 1294.

[105]*Id.* at 1290. *See also* Note, *supra* note 66.

[106]672 F.2d at 1294.

[107]*Id.* at 1296-97.

[108]403 So. 2d 1342 (Fla. Dist. Ct. App. 1981).

[109]*Miami Herald* is similar to *Infant Doe* for two reasons. First, both cases involve a court's denial of public access to both the court proceedings and the court records, thus denying access to all information about the case. Second, in both cases, the sole impediment to access is a court's closure order. *Miami Herald* and *Infant Doe* differ in this respect from *Warner Communications*. In *Warner Communications*, the district court faced an additional problem because the tapes the broadcasters sought to copy were being used as evidence in the trial at the time access was sought. *See supra* note 42 and accompanying text.

[110]403 So. 2d at 1343.

[111]*Id.* at 1344.

[112]*Id.* For citations to authorities describing the importance of open trials, see *supra* note 11. *But cf.* Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (holding that the United States Constitution does not guarantee the right of access to a pretrial *suppression* hearing in which all participants have agreed that closure is appropriate to protect the defendant's fair trial rights).

trial proceedings may eliminate the need for a trial, "'if the public is routinely excluded from all proceedings prior to trial, most of the work of the criminal courts will be done behind closed doors.' "[113] The court, however, recognized that a defendant's right to a fair trial may sometimes conflict with the public's right of access to information; therefore, the court adopted a test for reviewing closure orders.[114] The court held that the public can be denied access to court proceedings and *court records* only if the party opposing access proves that: "(1) closure is necessary to prevent a serious and imminent threat to the administration of justice, (2) no less restrictive alternative measure is available, and (3) closure will in fact achieve the court's purpose."[115]

This test requires the court to balance the public's right of access with conflicting interests. The heavy burden of proof that this test places on the party requesting closure is consistent with the court's description of the right of access as a "First Amendment freedom."[116] Using these criteria, the court found that closure was not necessary to ensure the defendant a fair trial.[117] The court, however, indicated that a concrete threat to a criminal defendant's constitutional right to a fair trial is one example of "a serious and imminent threat to the administration of justice."[118] *Miami Herald* also suggests that unless closure is required by "a serious and imminent threat," first amendment guarantees may be infringed when public access to the information contained in judicial records is completely denied by a closure order encompassing both court proceedings and court records.[119]

In *Northwest Publications, Inc. v. Anderson*,[120] the Supreme Court of Minnesota also examined the public's right of access to judicial records. In *Northwest Publications*, the court reviewed two separate orders that prohibited public access to judicial records relating to pending criminal cases. In one case, the accused was charged by complaint with murder. Responding to a joint motion by the state and

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[113]403 So. 2d at 1345 (quoting Westchester Rockland Newspapers, Inc. v. Leggett, 48 N.Y.2d 430, 436, 399 N.E.2d 518, 523, 423 N.Y.S.2d 630, 636 (N.Y. 1979)).

[114]403 So. 2d at 1345.

[115]*Id.*

[116]*Id.*

[117]Because only the defendant's ability to assist counsel would be in question at the competency hearing, and not his guilt, innocence, or sanity, the court stated that public access did not endanger the defendant's right to a fair trial. *Id.*

[116]*Id.*

[119]*Cf.* Krause v. Rhodes, 671 F.2d 212, 217 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982) (balancing "emanations from the First Amendment such as the public's right to know" and "legitimate privacy rights of many individuals," the *Rhodes* court affirmed a lower court order allowing public disclosure of discovery material that was not entered into evidence at trial).

[120]259 N.W.2d 254 (Minn. 1977).

the defendant, the trial court denied the public access to the state's complaint.[121] Similarly, in the second case, the trial court sealed the court file in a pending criminal case upon the joint motion of the defendant and the state.[122] Newspapers petitioned the Minnesota Supreme Court for writs of prohibition to restrain the trial courts from enforcing the closure orders.

The Minnesota Supreme Court discussed the nature of the right of access to judicial records and outlined a procedure for reviewing orders denying public access. Although the court described the right of access in terms of first amendment prohibitions of prior restraints on press publication, the court clearly stated that the review procedure applied to "decision[s] to limit *public* access to [judicial] records."[123] The court noted that closure is justified only in a "rare or extraordinary case" where public access interferes with a criminal defendant's right to a fair trial.[124] The court, however, found that the decision regarding access should largely remain with the trial court judge, and outlined a procedure to ensure a complete record from which an appellate court could effectively conduct a limited review.[125] The party requesting closure must make a "clear and substantial showing" that closure is justified.[126] This burden of proof must be met in "an adversary setting at which the public must be represented and afforded an opportunity to be heard."[127] The trial court must make "specific factual findings" showing how the court reached its conclusion that closure was "necessary" under the circumstances of the case.[128] The trial court must also consider all alternatives to closure and state its reasons for finding each alternative inadequate.[129] Ex-

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[121]Without the closure order, the complaint would have been filed with the clerk of the court and become a public record to which the public has a right of access.

[122]The court file included "orders for search warrants, supporting affidavits, and return of search warrants." 259 N.W.2d at 256 (quoting order of St. Louis County, Minn., District Ct. (July 29, 1977) (directing court clerk to allow public inspection of court file)).

[123]*Id.* at 257 (emphasis added).

[124]*Id.* The court cited the following cases as authority for the statement that in rare cases sealed records may be justified:

1) Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (in dicta, the United States Supreme Court refused to hold that the accused's sixth amendment right to a fair trial is subordinate to the press' first amendment right to publish in all circumstances); 2) Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) (in dicta, the court stated that the sixth amendment right to a fair trial must take precedence over the attorney's free speech right to make comments about pending litigation when there is an irreconcilable conflict between the rights), *cert. denied*, 427 U.S. 912 (1976).

[125]259 N.W.2d at 257.

[126]*Id.* at 258.

[127]*Id.* at 257.

[128]*Id.*

[129]*Id.* For examples of alternatives to closure see *supra* note 19.

amining the records of the two cases before it, the Minnesota Supreme Court concluded that each was "barren of any facts or other evidence which would constitute a clear and substantial showing" justifying denial of public access.[130]

B. The Right of Access in Civil Cases

Courts have also examined the public's right of access to judicial records of civil cases. In *Krause v. Rhodes*,[131] the Court of Appeals for the Sixth Circuit reviewed public disclosure orders issued by a district court. The orders allowed the public access to discovery material generated by civil cases arising from the Ohio National Guard action at Kent State University in 1970. The discovery material covered by the disclosure orders was not admitted at trial and never became part of the trial records. The Sixth Circuit identified several conflicting interests in the case before it. In favor of allowing disclosure were "emmanations from the First Amendment such as the public's right to know" and the historical relevance of the events portrayed in the records.[132] Opposing access were the privacy interests of individuals whose statements were recorded in the discovery materials in question.[133] Although the court identified the public's right of access as a first amendment right, the Sixth Circuit noted that " 'the decision as to access is one best left to the sound discretion of the trial court.' "[134] Reviewing the orders only for abuse of discretion,[135] the Sixth Circuit found that the district judge had properly balanced conflicting interests by allowing public access, while ordering the deletion of witnesses' names.[136]

In *Lowenschuss v. West Publishing Co.*,[137] the Court of Appeals for the Third Circuit examined the public's right of access to judicial opinions. Lowenschuss, a lawyer, brought a defamation action against West Publishing for the verbatim publication of a federal district judge's opinion containing an allegedly defamatory footnote.[138] Reviewing the

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[130]259 N.W.2d at 258.

[131]671 F.2d 212 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982).

[132]*Id.* at 217. *Cf. In re* "Agent Orange" Litigation, 9 MEDIA L. REP. (BNA) 1083 (E.D.N.Y. Jan. 18, 1983) (no first amendment right of access by non-parties to materials produced in discovery but not filed with the court and thus not made part of the public record).

[133]671 F.2d at 217.

[134]*Id.* at 219 (quoting Nixon v. Warner Communications, Inc., 435 U.S. 589, 599 (1978)).

[135]671 F.2d at 219.

[136]*Id.* at 217.

[137]542 F.2d 180 (3d Cir. 1976).

[138]Lowenschuss sought damages and a mandatory injunction to compel West to print an explanation with the controversial footnote. The footnote read: "It should be of some interest to the appropriate body of the Pennsylvania Bar whether the

district court's dismissal of the suit, the Court of Appeals for the Third Circuit recognized a "public interest in and need for access to verbatim reports of judicial decisions without excessive delay or expense."[139] The Third Circuit found that a common law system based upon the principle of stare decisis cannot function effectively unless authoritative precedents are readily available. Given the need for public access, the Third Circuit found that the judicial branch has a "duty" to publish and disseminate its decisions.[140] Because judges must be unhampered in the publication of their decisions, "a judge is absolutely privileged to publish even defamatory statements" if it has some relation to the case before the judge.[141] The Third Circuit found that the judge's absolute privilege extended to West Publishing in this case because "West's verbatim publication and effective dissemination of judicial opinions serves an intrinsic function in our system of jurisprudence."[142] The Third Circuit therefore upheld the dismissal of the suit.

IV. Analysis of the Courts' Balancing Process

The cases discussed above demonstrate that the public's right of access to judicial records is broad. The right may be exercised to gain access to court records of both criminal and civil cases. The right extends from discovery material,[143] to evidence displayed in open court,[144] to judge's opinions.[145] Considered altogether, these cases suggest some general answers to the questions left unresolved by the Supreme Court's decision in *Nixon v. Warner Communications, Inc.*:[146] the strength of the presumption favoring public access, the interests that outweigh the right of access, and the standards appellate courts should use to review trial court decisions to limit or allow public access.

The first question left unresolved by *Warner Communications* is the strength of the presumption to allow public access to judicial records. The Fifth Circuit, in *Belo Broadcasting*, stated that the Supreme Court's decision in *Warner Communications* was inconclusive

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plaintiff, a lawyer, truly purchased these shares as an investment for his pension plan or merely as a vehicle for this litigation in which counsel fees are sought." *Id.* at 182 (quoting Lowenschuss v. Kane, 367 F. Supp. 911, 913 n.1 (S.D.N.Y. 1973). *rev'd*, 520 F.2d 255 (2d Cir. 1975)).

[139] 542 F.2d at 185.

[140] *Id.*

[141] *Id.*

[142] *Id.* at 186.

[143] *See* Krause v. Rhodes, 671 F.2d 212 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982).

[144] *See* United States v. Myers, 635 F.2d 945 (2d Cir. 1980).

[145] *See* Lowenschuss v. West Publishing Co., 542 F.2d 180 (3d Cir. 1976).

[146] 435 U.S. 589 (1978).

regarding the weight to be assigned to the common law right of access to judicial records. The Fifth Circuit then described the presumption favoring public access as only one factor to be considered when deciding whether to limit access.[147] This discussion indicates that the Fifth Circuit viewed the presumption language in *Warner Communications* not as an evidentiary presumption resulting from the common law right of access, but rather as another way to describe the right itself.

In contrast to *Belo Broadcasting*, the majority of decisions have found a strong evidentiary presumption favoring public access that the party opposing access must overcome. In *Myers*, the Second Circuit found that only the "most compelling" circumstances justify denying public access to exhibits displayed in open court.[148] Similarly, in *Edwards*, the Seventh Circuit found a strong presumption in favor of public access.[149] The state courts in *Miami Herald* and *Northwest Publications* identified the first amendment as the source of the public's right of access and therefore strictly scrutinized arguments that a criminal defendant's right to a fair trial required a denial of public access.[150]

In civil cases most courts also assign the right of access more significance than did the Fifth Circuit in *Belo Broadcasting*.[151] For example, in *Krause v. Rhodes*,[152] the Sixth Circuit found that the "public's right to know" about the events surrounding the Kent State killings was based on the first amendment. The court, therefore, assigned the right significant weight when it was balanced against privacy interests.[153] In *Lowenschuss*, the Third Circuit found that the public's need for access to judicial opinions was crucial to the effective

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[147]*See supra* text accompanying note 98.

[148]*See supra* text accompanying notes 87-88.

[149]*See supra* text accompanying note 103.

[150]*See supra* text accompanying notes 115-19 and 123-29.

[151]Courts employ various protective measures to preserve confidentiality while allowing public access. *See, e.g.*, Centurion Indus., Inc. v. Warren Steurer & Assoc., 665 F.2d 323 (10th Cir. 1981) (protective orders fashioned by trial court held sufficient to protect against improper disclosure of trade secret when enforcing subpoenas to litigate trade secrets dispute); United States v. Doe, 496 F. Supp. 650 (D.R.I. 1980) (use of pseudonym "Doe" for juvenile petitioner sufficient to protect interests of juvenile); Application of Anonymous, 89 Misc. 2d 132, 390 N.Y.S.2d 779 (N.Y. Fam. Ct. 1976) (natural parents are necessary parties in an adoption proceeding, but court appointed guardian ad litem to protect the natural parents' anonymity); Olman v. Olman, 205 Or. 216, 286 P.2d 662 (1955) (evidence sustained finding that wife was entitled to divorce on grounds of cruel and inhuman treatment, but particular reference in appellate opinion to factual reasons for holding deemed unnecessary).

[152]671 F.2d 212 (6th Cir. 1982).

[153]*See supra* text accompanying notes 132-36.

operation of the American legal system and extended the judge's absolute immunity to protect West Publishing's publication of a defamatory judicial opinion.[154]

The second question left unanswered by the Supreme Court's decision in *Warner Communications* is what interests outweigh the public's right of access to judicial records. That is, when other interests conflict with the right of access, which interests preclude an exercise of the right. Although *Belo Broadcasting* indicates that closure is justified whenever adverse publicity poses any threat to a criminal defendant's fair trial rights,[155] the majority of the decisions indicate that the party opposing access must clearly demonstrate both that public access poses a real, immediate threat to a fair trial, and that less restrictive alternatives such as voir dire examination or change of venue will not adequately ensure a fair trial if public access is allowed.[156] Similarly, the privacy interests of litigants or witnesses in civil cases do not justify denying public access if less restrictive measures, such as the deletion of names from the court's records, will protect those privacy interests.[157] Finally, *Lowenschuss* demonstrates that the public's right of access to judicial opinions outweighs even a lawyer's interest in maintaining his good reputation.[158]

The final question left unanswered by *Warner Communications* is what standard appellate courts should use to review trial court decisions regarding public access to judicial records. Although the courts in *Myers* and *Miami Herald* indicated a willingness to reweigh the interests advanced by the parties in the trial court,[159] the majority of the decisions expressly state that the appropriate level of appellate review is for abuse of discretion.[160]

The cases discussed above provide some general principles for deciding when limits on public access are justified. However, these diverse cases only address limitations on access within the specific circumstances of individual cases. The discernible general principles cannot be used effectively until they are translated into clear standards applicable to many types of judicial records and applicable to a variety of factual situations.

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[154]*See supra* text accompanying notes 139-42.

[155]*See supra* text accompanying notes 96-100.

[156]*See, e.g.*, United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982).

[157]*See supra* note 151 and text accompanying note 136.

[158]*See supra* text accompanying notes 140-42.

[159]*See supra* text accompanying notes 93, 115-17.

[160]*See, e.g.*, United States v. Edwards, 672 F.2d 1289 (7th Cir. 1982); Krause v. Rhodes, 671 F.2d 212 (6th Cir.), *cert. denied*, 103 S. Ct. 54 (1982); Belo Broadcasting Corp. v. Clark, 654 F.2d 423 (5th Cir. 1981); Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977).

V. SUGGESTED PROCEDURE

This procedure is suggested as a rule of appellate procedure for the purpose of reviewing trial court decisions to deny public access to judicial records. The procedure is applicable to decisions denying public access to records of either civil or criminal cases.

1. The public may not be denied access to judicial records unless the party petitioning for closure demonstrates that justice so requires.

(a) A trial court, upon receiving a petition to deny public access to the records in its custody, shall hold a hearing within thirty days for the purpose of determining whether closure will be ordered. At the hearing, the public must be represented and afforded an opportunity to be heard.

(b) The party petitioning for closure has the burden of proving by clear and convincing evidence that closure is necessary to protect a countervailing interest.

(c) The trial court shall make specific factual findings which led it to conclude that closure was necessary under the circumstances of the particular case.

(d) The trial court shall consider alternatives to closure, and state the reasons for its conclusion that other alternatives are inadequate to protect the interests advanced by the petitioning party.

2. A petition to review an order excluding the public from access to judicial records, if the records are not required by law to be confidential, shall be filed in the appellate court, within thirty days following the issuance of the closure order. A copy shall be furnished to the judge issuing the closure order and to all parties involved. Review by the appellate court is limited to review for abuse of discretion.

Section 1 of the suggested procedure establishes a presumption to allow public access to judicial records. Unless the Supreme Court clearly acknowledges a constitutional source for the public's right of access to judicial records, a procedure outlining standards for reviewing closure orders should assume a common law source for the right. Nevertheless, the democratic principles underlying the common law right of access to judicial records demonstrate that the right serves important functions in the American legal system.[161] The significance of the common law right suggests that a strong presumption in favor of access is justified even if the right is not protected by the United

[161] *See supra* text accompanying notes 23-35.

States Constitution. By requiring the party petitioning for closure to demonstrate that justice requires denying public access, Section 1 establishes a strong presumption to allow access, in line with the federal court of appeals decisions in *Myers*[162] and *Edwards*,[163] yet avoids the stringent standards enunciated by courts finding a constitutional source for the public's right of access.[164]

Section 1(a) follows the procedure outlined in *Northwest Publications* requiring a hearing before closure is ordered.[165] Although the court in *Northwest Publications* found a first amendment source for the right of access, the hearing requirement is also appropriate in a procedure relying on the common law right of access. Unless a forum is provided where the public can protect the common law right, the right has little meaning or force.

Section 1(b) places on the party requesting closure the burden of persuading the court by clear and convincing evidence that closure is necessary to protect competing interests. The cases discussed in this Note do not give precise indications of the proper burden of persuasion that must be met to justify denying public access. However, the standards ennunciated by the courts in *Myers* ("the most compelling circumstances"),[166] in *Edwards* ("justice so requires"),[167] in *Miami Herald* ("a serious and imminent threat to the administration of justice"),[168] and in *Northwest Publications* ("clear and substantial showing")[169] demonstrate that a heavier burden of proof than the normal civil standard of proof by a preponderance of the evidence is appropriate.[170]

Section 1(c) follows *Edwards* and *Northwest Publications* by emphasizing that a clear statement of the trial court's reasons for ordering closure is necessary for effective appellate review.

The criminal cases discussed above demonstrate that the public may not be denied access to judicial records when the defendant's fair trial rights can be protected by less restrictive measures such as voir dire examination and change of venue.[171] Similarly, in *Krause* the Sixth Circuit found that public access could not be denied when the deletion of names protected privacy interests that conflicted with

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[162]*See supra* text accompanying notes 86-88.

[163]*See supra* text accompanying notes 103-05.

[164]*See, e.g.*, Miami Herald Publishing Co. v. Chappell, 403 So. 2d 1342, 1345 (Fla. Dist. Ct. App. 1981) (stating that the party opposing access must prove that "closure is necessary to prevent a serious and imminent threat to the administration of justice").

[165]*See supra* note 142 and accompanying text.

[166]635 F.2d at 952.

[167]672 F.2d at 1290.

[168]403 So. 2d at 1345.

[169]259 N.W.2d at 258.

[170]*See generally* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 339-41 (2d ed. 1972).

[171]*See, e.g.*, United States v. Myers, 635 F.2d 945, 953 (2d Cir. 1980).

the public's right of access.[172] Section 1(d) of the suggested procedure follows these cases by requiring the trial court to consider alternatives to closure. To facilitate appellate review, this subsection also requires the trial court to state the reasons that other methods were deemed inadequate.

Section 2 of the suggested procedure recognizes a forum for vindication of the common law right of access when public access is denied by a trial court.[173] Each of the cases discussed in this Note demonstrates that a forum for reviewing denials of public access is appropriate; in each case an appellate court reviewed a lower court's decision regarding public access. Section 2 also acknowledges that some judicial records, such as records of adoption[174] and juvenile court proceedings,[175] are required by law to be confidential and excludes from appellate review closure orders directed to these records. Guided by the express statements in the majority of cases, Section 2 provides for limited appellate review for abuse of discretion.

VI. CONCLUSION

United States courts recognize the historical and contemporary importance of the public's right of access to judicial records. The right is based upon the distrust of secretly administered justice and the principle that the law proclaimed and construed by courts must be available to all, because it binds everyone. The right of access also serves the doctrine of stare decisis by ensuring that relevant decisions are available for future use. Furthermore, the right of access allows the public to scrutinize judicial decision making. Such public scrutiny helps to prevent abuses of judicial authority, to promote confidence in the judicial system, and to produce an informed and enlightened public.

Although the significance of the right of access is well recognized, the courts have not provided clear standards for limiting public ac-

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[172]*See supra* text accompanying note 136.

[173]Section 2 is modeled after FLA. R. APP. P. 9.100, *quoted in* Miami Herald Publishing Co. v. Chappell, 403 So. 2d 1342, 1342-43 n.1 (Fla. Dist. Ct. App. 1981):

> (d) Exception; Orders Excluding Press or Public.
>
> (1) A petition to review an order excluding the press or public from access to any proceeding, any part of a proceeding, or any judicial records, if the proceedings or records are not required by law to be confidential, shall be filed in the court as soon as practicable following rendition of the order to be reviewed, if written, or announcement of the order to be reviewed, if oral. A copy shall be furnished to the person . . . issuing the order, and the parties to the proceeding.

[174]*See, e.g.*, IND. CODE § 31-3-1-5 (Supp. 1983).

[175]*See, e.g.*, 18 U.S.C. § 5038 (1976); IND. CODE § 31-6-8-1 (1982).

cess to judicial records. A number of factors that contribute to the uncertainty surrounding the standards used to limit public access have been identified. Perhaps the most significant factor is the indecision about the source of the right of public access. The source of the right of access affects the scope of the right and limits the right when it is balanced against other interests. As long as the source of the right of access remains in doubt, other aspects of the right also remain undefined. If the United States Supreme Court were to give clearer direction concerning the source of the right of public access, then the courts could apply and protect the right in a more uniform manner.

Identification of the source of the right of public access, however, would not alone cure the problem of uncertain standards. The need for a clearly articulated procedure for imposing and reviewing limitations on public access is emphasized by a complete denial of public access in a case, like *Infant Doe*, involving controversial and unsettled legal issues. The decision in *Infant Doe* led to public outcry[176] which was, perhaps, intensified by the denial of access to information about the case. The public reaction to *Infant Doe* required the Indiana Legislature to attempt to draft responsive legislation without complete information about the case.[177] The public and the Indiana Legislature might have responded to the *Infant Doe* decision even if information about the case had been available. The response, however, might have been foreclosed, or more informed, if the facts and law underlying the decision had been available for public inspection. If judicial bodies develop procedural rules, such as the procedure suggested above, for the imposition and review of closure orders, the public will be assured that information about cases like *Infant Doe* will be available except in the rare case where justice requires the records to be sealed.

KATHRYN L. HAGENBUCH

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[176]Indianapolis Star, Apr. 27, 1982, at 1, col. 4.

[177]Act of Apr. 19, 1983, Pub. L. No. 288, 1983 Ind. Acts 1783 (codified at IND. CODE § 31-6-4-3 (Supp. 1983)).

Jones v. Schweiker: Illegitimate Children and Social Security Benefits

I. INTRODUCTION

"We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment."[1] This statement by Justice Douglas, speaking for the United States Supreme Court in 1968, indicates that the rights of illegitimate children have progressed substantially since earlier times. At common law an illegitimate child was considered a *filius nullius*, the child of no one.[2] The harshness with which the law treated the illegitimate child is demonstrated by the common law inheritance rules. There it was said that the illegitimate child "had neither father, mother, nor sister. He could neither take from, nor transmit to, those standing in such relations to him, any estate by inheritance."[3] Although the severity of such rules has slowly been tempered,[4] in part by Supreme Court decisions, illegitimate children still face hurdles in many areas in which legitimate children do not, including the area of participation in government benefit programs.

Since 1968, the United States Supreme Court has decided several

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[1]Levy v. Louisiana, 391 U.S. 68, 70 (1968) (citations omitted). The number and percentage of children born out of wedlock has risen dramatically in the last few decades. Of the 3,333,279 children born in the United States in 1978, 543,991 (16.3%) were illegitimate. U.S. DEP'T OF HEALTH AND HUMAN SERVICES, VITAL STATISTICS OF THE UNITED STATES, 1978, Vol. 1.1 (1982) (tables 1-1 and 1-31). In 1960 only 5.3% of the children born were illegitimate. *Id.* These figures represent over a 300% increase in the percentage of illegitimate children in just eighteen years. The percentage of non-white children born out of wedlock far exceeds the national average. In 1978, 53.2% of the non-white children born were illegitimate. *Id.* These figures demonstrate that laws which discriminate against illegitimate children do so against a large and growing percentage of all children. The figures also show that the impact of those discriminatory laws burden non-white children in a substantially disproportionate manner as compared to white children.

[2]*See, e.g.*, Truelove v. Truelove, 172 Ind. 441, 86 N.E. 1018 (1909); Jackson v. Hocke, 171 Ind. 371, 84 N.E. 830 (1908).

[3]McCool v. Smith, 66 U.S. (1 Black) 459, 470 (1861).

[4]*See, e.g.*, IND. CODE § 29-1-2-7 (1982). That section provides in part:

> (a) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his mother . . . .
>
> (b) For the purpose of inheritance to, through and from an illegitimate child, such child shall be treated the same as if he were the legitimate child of his father, if but only if, (1) the paternity of such child has been established by law, during the father's lifetime; or (2) if the putative father marries the mother of the child and acknowledges the child to be his own.

cases concerning the rights of illegitimate children.[5] The challenges made by illegitimate children to state and federal laws have generally been based on equal protection grounds. The Supreme Court has never held illegitimacy to be a suspect classification, and, therefore, has never applied strict scrutiny in these cases.[6] However, an analysis of the cases in this area demonstrates that the Supreme Court examines statutory classifications based on illegitimacy with a higher degree of scrutiny than the standard low level requirement that the means be rationally related to legitimate governmental interests. This is indicated both in the outcome of some of the cases,[7] and in the Court's statements that the level of scrutiny appropriate in testing classifications based on legitimacy "is not a toothless one"[8] and that such classifications will violate the equal protection clause "if they are not substantially related to permissible state interests."[9] With a few signifi-

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[5]The major cases since 1968 are: (1) Levy v. Louisiana, 391 U.S. 68 (1968) (Louisiana wrongful death statute that denied recovery to illegitimate children held unconstitutional); (2) Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (Louisiana statute that barred recovery to parents of illegitimate children but allowed it for parents of legitimate children held unconstitutional); (3) Labine v. Vincent, 401 U.S. 532 (1971) (Louisiana statute that prevented illegitimate children from sharing equally in father's estate with legitimate children held constitutional); (4) Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164 (1972) (Louisiana statute that prevented illegitimate children from recovering under worker's compensation law held unconstitutional); (5) Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972) (provisions of the Social Security Act that reduced benefits to otherwise eligible illegitimate children held unconstitutional); (6) Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972) (same as (5)); (7) Gomez v. Perez, 409 U.S. 535 (1973) (Texas law denying illegitimate children right to paternal support while giving that right to legitimate children held unconstitutional); (8) New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (statute limiting right of illegitimate children to state provided assistance to poor working families held unconstitutional); (9) Jimenez v. Weinberger, 417 U.S. 628 (1974) (Social Security Act provisions limiting illegitimate child's claim for disability benefits to certain situations held unconstitutional); (10) Mathews v. Lucas, 427 U.S. 495 (1976) (Social Security Act provisions that create presumption of dependency for legitimate and some illegitimate children held constitutional); (11) Trimble v. Gordon, 430 U.S. 762 (1977) (Illinois statute limiting right of illegitimate children to inherit from their fathers through intestate succession held unconstitutional); (12) Lalli v. Lalli, 439 U.S. 259 (1978) (New York intestate succession statute following illegitimate child to inherit only if paternity decree is entered during father's lifetime held constitutional); (13) United States v. Clark, 445 U.S. 23 (1980) (illegitimate child entitled to survivor's benefits under Civil Service Retirement Act, statutory construction avoided constitutional issue); (14) Mills v. Habluetzel, 456 U.S. 91 (1982) (Texas statute requiring paternity suit to be brought within one year of illegitimate child's birth held unconstitutional).

[6]*See* Mathews v. Lucas, 427 U.S. at 505-06.

[7]*See infra* text accompanying note 61.

[8]427 U.S. at 510.

[9]Lalli v. Lalli, 439 U.S. at 265. For a more thorough discussion of the Court's equal protection analysis in cases dealing with illegitimacy, see Kellett, *The Burger Decade: More Than Toothless Scrutiny For Laws Affecting Illegitimates*, 57 U. DET. J. URB. L. 791 (1980); Maltz, *Illegitimacy and Equal Protection*, 1980 ARIZ. ST. L.J. 831;

cant exceptions, the Court has ruled in favor of the illegitimate child.[10] The Supreme Court has addressed the rights of illegitimate children in four cases under the Social Security Act.[11]

The Social Security Act provides that children who meet certain criteria are eligible for benefits after the death of an insured parent.[12]

Isaacson, *Equal Protection for Illegitimate Children: A Consistent Rule Emerges*, 1980 B.Y.U. L. Rev. 142: Comment, *Illegitimates and Equal Protection:* Lalli v. Lalli—*A Retreat from* Trimble v. Gordon, 57 DEN. L.J. 453 (1980).

[10]*See* cases cited *supra* note 5. A look at how the individual Justices voted in the above decisions provides some enlightening information. The chart below indicates the cases by the numbers assigned in footnote 5 above. A vote for the illegitimate party is shown by a "*" and a vote against is indicated by a "—."

Case Number

Justice	1	2	3	4	5	6	7	8	9	10	11	12	13	14
Warren	*	*												
Fortas	*	*												
Black	—	—	—											
Harlan	—	—	—											
Douglas	*	*	*	*	*	*	*	*	*					
Stewart	—	—	—	*	—	—	—	*	*	—	—	—	—	
Brennan	*	*	*	*	*	*	*	*	*	*	*	*	*	*
White	*	*	*	*	*	*	*	*	*	—	*	*	*	*
Marshall	*	*	*	*	*	*	*	*	*	*	*	*	*	*
Burger			—	*	—	—	*	*	*	—	—	—	*	*
Blackmun			—	*	*	*	*	*	*	—	—	—	*	*
Powell				*	*	*	*	*	*	—	*	—	*	*
Rehnquist				—	—	—	—	—	—	—	—	—	—	*
Stevens										*	*	*	*	*
O'Connor														*

Justice O'Connor's strong concurring opinion in *Mills* (14) suggests that there will consistently be at least five votes in favor of the illegitimate party (Brennan, White, Marshall, Stevens, and O'Connor). When these five votes are combined with the fact that Rehnquist, in his first vote for an illegitimate party, wrote in *Mills* for a Court with no dissent, it appears that illegitimate children may fare even better when their case is before the Court in the future, than they have in the past.

[11]Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); Griffin v. Richardson, 346 F. Supp. 1226 (D. Md.), *aff'd*, 409 U.S. 1069 (1972); Davis v. Richardson, 342 F. Supp. 588 (D. Conn.), *aff'd*, 409 U.S. 1069 (1972).

[12]42 U.S.C.A. § 402(d)(1) (West 1983) provides in part:

> Every child (as defined in section 416(e) of this title) of an individual . . . who dies a fully or currently insured individual, if such child—
>
> (A) has filed application for child's insurance benefits,
>
> (B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time elementary or secondary school student and had not attained the age of 19 . . . and
>
> (C) was dependent upon such individual—
>
> . . .
>
> (ii) if such individual has died, at the time of such death . . .
>
> . . . .
>
> shall be entitled to a child's insurance benefit . . . .

For the statutory definitions of "fully insured" and "currently insured" see 42 U.S.C.

One eligibility requirement is that the children be dependent on the insured parent at the time of the insured's death.[13] To aid in the determination of which children qualify for benefits, the Act establishes certain presumptions of dependency, including the presumption that all legitimate and adopted children are dependent on the insured parent.[14] The Act also provides several presumptions of dependency for illegitimate children, one arising when an illegitimate child inherits personal property from the estate of the deceased parent under state intestate succession law.[15] Several recent cases have dealt with the question of how this presumption of dependency should operate when a state's intestate succession law is found unconstitutional.[16] The Supreme Court faced this issue when it heard the case of *Jones v. Schweiker*.[17] The Court, however, did not resolve the issue and has

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§ 414(a) (1976) and 42 U.S.C. § 414(b) (1976), respectively. The same criteria apply to determine the eligibility of children for benefits under the Act's old-age and disability insurance provisions.

[13]42 U.S.C.A. § 402(d)(1)(C) (West 1983).

[14]42 U.S.C. § 402(d)(3) (1976) provides:

> A child shall be deemed dependent upon his father or adopting father . . . at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—
>
> (A) such child is neither the legitimate nor adopted child of such individual, or
>
> (B) such child has been adopted by some other individual.
>
> For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

[15]42 U.S.C. § 416(h)(2)(A) (1976) provides in part:

> In determining whether an applicant is the child . . . of a fully or currently insured individual . . . the Secretary shall apply such law as would be applied in determining the devolution of intestate personal property . . . if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death . . . . Applicants who according to such law would have the same status relative to taking intestate personal property as a child . . . shall be deemed such.

Illegitimate children may also qualify as dependent if other statutory conditions are met. A child whose parents went through a marriage ceremony which was rendered invalid by a legal impediment is deemed a legitimate child and is therefore eligible for benefits. *See* 42 U.S.C. § 416(h)(2)(B) (1976) and 42 U.S.C. § 402(d)(3) (1976). When the deceased father, before death, acknowledges in writing that the child is his son or daughter, or was decreed to be the child's father by a court, or was ordered by a court to provide support for the child because of paternity, or if the father lived with or contributed to the support of the child at the time of his death, the child is deemed legitimate. *See* 42 U.S.C. § 416(h)(3)(C) (1976 & Supp. V 1981) and 42 U.S.C. § 402(d)(3) (1976).

[16]*See* cases cited *infra* note 74.

[17]668 F.2d 755 (4th Cir. 1981), *vacated sub nom.* Jones v. Heckler, 103 S. Ct. 1763 (1983).

remanded the case to the Court of Appeals for the Fourth Circuit for reconsideration.[18] The original circuit court opinion in *Jones* held that finding a state's intestacy law unconstitutional does not qualify otherwise ineligible illegitmate children for benefits under the Act.[19] This Note will demonstrate that legal analysis supports the opposite conclusion, and that illegitimate children confronted with such a situation do qualify for benefits under the Act.

This Note will first examine the Supreme Court cases that have addressed the Social Security Act presumptions of dependency, and the Court's decisions dealing with the constitutionality of state intestate succession laws. Next, the circuit court's opinion in *Jones* will be evaluated by examining the congressional intent underlying the relevant Social Security Act provisions and by exploring federal constitutional considerations not dealt with by the Fourth Circuit. Finally, an analysis of how *Jones* will be decided on remand will be presented.

II. Historical Perspective

A. The Validity of the Statutory Presumptions

The statutory presumptions of dependency created by the Social Security Act were challenged in *Mathews v. Lucas*.[20] In that case, the mother of two illegitimate children, Ruby and Darin Lucas, applied for surviving children's benefits for Ruby and Darin after their father, the insured, died.[21] Although the Social Security Administration found that the insured was the children's father, it ruled that the children's actual dependence upon the insured had not been demonstrated, and that none of the statutory presumptions of dependency applied.[22] Ruby and Darin were, therefore, not entitled to survivor's benefits.

On appeal to the District Court of Rhode Island, the children's mother contended that the Act violated the equal protection component of the due process clause of the fifth amendment because some children, including all legitimate children, are statutorily entitled to survivorship benefits regardless of actual dependency while others are not.[23] The district court held that the statutory presumptions were

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[18]Jones v. Heckler, 103 S. Ct. 1763 (1983).

[19]668 F.2d at 759.

[20]427 U.S. 495 (1976).

[21]*Id.* at 497. The application was filed under 42 U.S.C. § 402(d)(1) (1970) & Supp. IV 1974) (current version at 42 U.S.C.A. § 402(d)(1) (West 1983)).

[22]The Social Security Administration ruled that the children had failed to show their dependency by proof that their father either lived with them or was contributing to their support at the time of his death. 427 U.S. at 500-01. For a discussion of the statutory presumptions, see *supra* notes 14-15 and accompanying text.

[23]Lucas v. Secretary, 390 F. Supp. 1310, 1314-15 (D.R.I. 1975).

unconstitutional and found the children eligible for benefits.[24] Although the district court found that the closest judicial scrutiny was not necessary to find the classifications unconstitutional, the court concluded, in dicta, that statutory classifications based on illegitimacy should be examined with strict scrutiny.[25] The Supreme Court disagreed.

The Supreme Court began its analysis by rejecting the applicability of strict scrutiny to classifications based on illegitimacy. Although the Court stated that the appropriate level of scrutiny was "not a toothless one,"[26] it found that strict scrutiny was not called for because discrimination against illegitimates "has never approached the severity or pervasiveness of . . . discrimination against . . . Negroes."[27] The appellees were, therefore, required "to demonstrate the insubstantiality"[28] of the relationship between the statutory classifications and the government interests which the classifications were designed to promote.

The Court next identified two government interests which the presumptions were intended to further: conditioning entitlement to benefits on dependence and administrative convenience. The government claimed that the provisions were designed by Congress to provide benefits to those children who were actually dependent on the insured at the time of his death.[29] The government argued that the provisions were not impermissibly discriminatory because a child's classification as legitimate or illegitimate is only relevant to a determination of dependency. The Court accepted this characterization of Congressional intent, and found that conditioning entitlement to benefits on dependency was a legitimate government interest.[30] The statute's classifications, the Court concluded, were permissible "because they are *reasonably related* to the likelihood of dependency at death."[31] The Court also determined that Congress adopted the statutory presumptions to avoid the administrative inconvenience of

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[24]The district court found the dependency classifications to be over inclusive because some children were eligible for benefits regardless of actual dependency. *Id.* at 1319-20. The court concluded that although the Act showed Congress' view as to which children are entitled to support, reflecting society's favoritism of legitimate children, such a basis for the Act's dependency provision did not constitute a legitimate governmental interest and therefore failed to meet the equal protection challenge. *Id.* at 1320.

[25]*Id.* at 1318-19.

[26]427 U.S. at 510.

[27]*Id.* at 506.

[28]*Id.* at 510.

[29]*Id.* at 507. The government appealed directly to the Supreme Court under 28 U.S.C. § 1252 (1976).

[30]427 U.S. at 507.

[31]*Id.* at 509 (emphasis added).

making case-by-case determinations of dependency. Finding that administrative convenience can be a legitimate government interest, the Court stated that Congress had made "reasonable empirical judgments . . . consistent with a design to qualify entitlement to benefits upon a child's dependency at the time of the parent's death."[32] The Court concluded that it could not say that the presumptions "lack any substantial relation to the likelihood of actual dependency,"[33] and held that the challenged classifications were permissible means to the government's goals.[34]

Mathews v. Lucas established the constitutionality of the Social Security Act presumptions of dependency. One of the presumptions approved in *Lucas*, section 416(h)(2)(A), finds an applicant to be the child of the insured, and therefore eligible for benefits, if the applicant would take personal property as a child under the intestate succession laws of the state in which the insured was domiciled at his death.[35] In a footnote in *Lucas*, the Supreme Court commented that "[a]ppellees do not suggest, and we are unwilling to assume, that discrimination against children in appellees' class in state intestacy laws is constitutionally prohibited . . . in which case appellees would be made eligible for benefits" under section 416(h)(2)(A).[36] *Jones v. Schweiker*[37] presents the situation where a claim for benefits under section 416(h)(2)(A) is based upon an equal protection challenge to state intestacy laws.[38] Before exploring the merits of this claim, it is necessary to examine the Supreme Court decisions dealing with state intestacy laws that discriminate against illegitimates.

B. The Illegitimate's Right to Intestate Inheritance

Those urging the creation and protection of equal rights for illegitimate children, as related to legitimate children, suffered a substantial setback in 1971 with the Supreme Court's decision in *Labine v. Vincent*.[39] *Labine* involved an illegitimate, Rita Vincent, whose father had publicly acknowledged her according to procedures

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[32]*Id.* at 510.

[33]*Id.* at 513.

[34]Justice Stevens, writing for a dissent of three, found that the majority opinion shed little light on what was the proper level of scrutiny. *Id.* at 519. He concluded that the governmental interest of administrative convenience was not sufficient to justify the classifications, which he believed were "more probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates." *Id.* at 523.

[35]42 U.S.C. § 416(h)(2)(A) (1976); *see supra* note 15.

[36]427 U.S. at 515 n.18.

[37]668 F.2d 775 (4th Cir. 1981), *vacated sub nom.* Jones v. Heckler, 103 S. Ct. 1763 (1983).

[38]*See supra* note 15.

[39]401 U.S. 532 (1971) (5-4 decision).

authorized by Louisiana law. This acknowledgement, nevertheless, did not entitle Rita to share equally in her father's intestate estate. Rather, the state intestate statute provided for her to inherit only if there were no other surviving descendants, ascendants, wife, or collaterals.[40] When Rita's father died intestate, her guardian sought to have her declared the sole heir as her father's only child. The Louisiana Court of Appeals ruled that because Rita's father had surviving collateral relations, Rita was excluded from any inheritance.[41]

On appeal to the Supreme Court,[42] Rita's guardian relied heavily on a Supreme Court decision, *Levy v. Louisiana*,[43] which held a Louisiana statute allowing legitimate children to recover damages for the wrongful death of their parents, while denying the same right to illegitimate children, to be invidious discrimination in violation of the equal protection clause of the fourteenth amendment.[44] The Court in *Labine*, however, said that *Levy* could not be construed to bar the states from ever treating legitimate and illegitimate children differently.[45] In upholding the Louisiana statute the Court reasoned that the factual situation in *Levy*, where the state had created an "insurmountable barrier" to a wrongful death recovery by illegitimate children,[46] was distinguishable from that in *Labine*, where the father could have left Rita property by executing a will or by legitimating her.[47]

The Court also found two state interests, promoting family life and regulating property disposition, that justified the Louisiana statute.[48] The Court observed that the power to regulate these areas was constitutionally given to the states.[49] "Absent a specific constitutional guarantee, it is for that legislature [Louisiana's], not the life-tenured judges of this Court, to select from among possible laws."[50]

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[40]LA. CIV. CODE ANN. art. 919 (West 1952) (repealed 1981). "Natural children are called to the inheritance of their natural father, who has duly acknowledged them, when he has left no descendants nor ascendants, nor collateral relations, nor surviving wife, and to the exclusion only of the State."

[41]229 So. 2d 449 (La. Ct. App. 1969), *cert. denied*, 255 La. 480, 231 So. 2d 395 (1970), *aff'd*, 401 U.S. 532 (1971).

[42]401 U.S. 532 (1971).

[43]391 U.S. 68 (1968).

[44]*Id.* at 72.

[45]401 U.S. at 536.

[46]*Id.* at 539.

[47]*Id.*

[48]*Id.* at 538.

[49]*Id.*

[50]*Id.* at 538-39. The Court observed that while some other choices might be "more closely connected to our conceptions of social justice," it was for the state to choose from the rational options. *Id.* at 538. It is interesting to note that in 1891, the Court made a similar observation in upholding a Utah statute *allowing* illegitimates to in-

This statement indicates the extremely deferential approach used by the Court in reviewing the statute. Thus, Louisiana's statute, which severely limited the right of illegitimate children to inherit from their fathers, was allowed to stand.

For the next six years it appeared that illegitimates would have to rely on the benevolence of the states if they were to be given intestate inheritance rights. Then, in 1977, the Court in *Trimble v. Gordon*[51] struck down an Illinois statutory provision limiting an illegitimate's right to inherit by intestate succession.[52] *Trimble* involved an illegitimate child, Deta Mona, who lived with both of her unmarried parents until her father, Mr. Gordon, was killed in 1974. In 1973, an Illinois state court had entered a paternity order finding Gordon to be Deta Mona's father and ordering him to make payments for her support. Under the Illinois Probate Act, Deta Mona could inherit from and through her mother but was not entitled to share in the estate of her father because he had not married her mother or acknowledged Deta Mona as his daughter.[53] By comparison, a legitimate child in Deta Mona's position as only child would have inherited her father's entire estate.[54]

The Court began by discussing the test it must use to examine state statutory classifications that discriminate against illegitimates. Although finding that illegitimacy has never been held a suspect classification requiring strict scrutiny, the Court restated that the level of scrutiny is not a toothless one.[55] " '[T]his Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.' "[56] With these conceptual standards

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herit from their fathers. Cope v. Cope, 137 U.S. 682 (1891). The Court there said that "[t]he distribution of and the right of succession to the estates of deceased persons are matters exclusively of State cognizance . . . ." *Id.* at 684. The Court went on to say that the law, based on Utah's Mormon heritage, was not void because of "its failure to conform to our own standard of social and moral obligations." *Id.* at 685.

[51]430 U.S. 762 (1977).

[52]*Id.* at 776.

[53]ILL. REV. STAT. ch. 3, § 12 (1973) (current version at ILL. REV. STAT. ch. 110 1/2, § 2-2 (1979)). The contested version read in part, "[a] child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate." *Id.* The amended version is more liberal in providing for illegitimates to inherit from their fathers. The new statute provides in part, "[i]f a decedent has acknowledged paternity of an illegitimate person or if during his lifetime or after his death a decedent has been adjudged to be the father of an illegitimate person, that person is heir of his father and of any paternal ancestor . . . ." ILL. REV. STAT. ch. 110 1/2, § 2-2 (1979).

[54]430 U.S. at 765. Sherman Gordon's entire estate consisted of a 1974 automobile valued at approximately $2,500. *Id.* at 764.

[55]*Id.* at 767 (citation omitted) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

[56]430 U.S. at 766 (citation omitted) (quoting Weber v. Aetna Casualty & Sur. Co., 406 U.S. 164, 172 (1972)).

in mind, the Court examined the justifications put forward by Illinois for the statute.

The Court first rejected the state's claim that the statute promoted legitimate family relationships. The Court found that the statute bore "only the most attenuated relationship to the asserted goal,"[57] reasoning that it was illogical and unjust to attempt to compel adults to live up to accepted standards of conduct by punishing the innocent children of unmarried couples.

Next, the Court looked at the state's interest in orderly property disposition and the concern that the difficulty of proving paternity might lead to spurious claims. Although finding that decisions about intestate inheritance schemes are usually left to the states, the Court believed that there was a middle ground between proving paternity case-by-case and the total exclusion of illegitimates. The Court reasoned that some categories of illegitimate children could be allowed to inherit without disrupting the orderly settlement of estates.[58] As an example of a situation falling in the middle ground, the Court pointed to Deta Mona, who could prove that Mr. Gordon was her father with the state court's paternity decree. The statute, which would exclude Deta Mona from inheriting from her father's intestate estate, could not be justified as promoting accurate or efficient property disposition, and it extended "well beyond the asserted purposes."[59]

The third justification presented by the state was that the statute created no insurmountable barrier to inheritance by illegitimates because fathers could insure that their illegitimate children would inherit from their estates by executing a will or by legitimating the children. Although the first two justifications were considered to be legitimate state interests which simply were not adequately furthered by the statute, the Court gave the third justification much less credence, calling it "an analytical anomaly."[60] The Court reasoned:

> Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances.[61]

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[57]430 U.S. at 768. The Court noted that the Illinois Supreme Court had not analyzed the relationship between the statute and the goal, a claim which the Court admitted could also be made about its decision in *Labine*. *Id.* at 769.

[58]*Id.* at 771.

[59]*Id.* at 772-73.

[60]*Id.* at 773.

[61]*Id.* at 773-74. The hypothetical circumstances referred to the state's contention that Mr. Gordon could have left Deta Mona property by executing a will or legitimating her. *Id.* at 773.

Because the insurmountable barrier concept is unrelated to the constitutional ends-means analysis, the Court ruled that it had no constitutional significance in this case.[62]

Thus, the same state interests which six years earlier had justified the Louisiana intestate statute involved in *Labine* were found inadequate to uphold the Illinois statute involved in *Trimble*. The different result occurred because in *Trimble*, the Court scrutinized the relationship between the government interests advanced and the means used to achieve these interests more carefully than it did in *Labine*. The Court acknowledged that it had failed in *Labine* to adequately consider the relation part of the equal protection test, making its "constitutional analysis incomplete."[63] In *Trimble*, the Court recognized the legitimacy of the state interests in promoting family life and establishing an efficient method of property disposition. However, the Court took the next step, the one it refused to take in *Labine*, and held that the means employed by the state were not adequately related to those legitimate ends. Although the Court in *Trimble* remained unwilling to accept illegitimate children as a suspect class,[64] and did not clearly articulate the proper level of scrutiny for classifications based on illegitimacy, the result in the case clearly shows that it applied a higher level of scrutiny than the almost total deference used in *Labine*.

The third important Supreme Court decision examining the treatment of illegitimates under a state intestate succession statute came in 1978, one year after the *Trimble* decision. In *Lalli v. Lalli*,[65] the Court upheld New York's intestate succession law which conditioned the right of illegitimate children to inherit from their fathers upon a court decree of paternity prior to the father's death.[66] The Court distinguished the New York statute from statutes like that in *Trimble*, which required both acknowledgment by the father and marriage between the parents as preconditions to inheritance. The New York statute had no marriage requirement. Nor did the state contend that the purpose of the law was to promote legitimate family relationships. Rather, the goal of the statute was to promote orderly property

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[62]*Id.* at 774. The Court also examined the state's claim that the statute represented the presumed intent of the Illinois citizens regarding property disposition at their death. *Id.* at 774-76. This was rejected not only because the Illinois Supreme Court had not relied upon it when deciding the case, but also because the Court was convinced that the statutory provision was enacted for other purposes. *Id.* at 775.

[63]*Id.* at 769.

[64]430 U.S. at 767.

[65]439 U.S. 259 (1978) (5-4 decision). Justice Powell, who wrote for the Court in both *Trimble* and *Lalli*, joined with the four dissenting Justices in *Trimble* to form the majority in *Lalli*. Both Justice Blackmun and Justice Rehnquist wrote separate opinions concurring in the result.

[66]439 U.S. at 275-76.

disposition.[67] The Court found this state interest to be "substantial"[68] and found that the New York legislature had carefully balanced the rights of illegitimate children with the important state interest. Concluding that the requirements of the New York statute were "substantially related to the important state interests the statute is intended to promote,"[69] the Court held that the statute did not violate the equal protection clause of the fourteenth amendment.

Lalli demonstrated that some difference in the treatment of legitimate and illegitimate children will be allowed if the challenged classifications meet the appropriate equal protection test. The Court in *Lalli* also provided clarification as to what level of scrutiny will be applied to statutes basing classifications on illegitimacy. The Court stated that such classifications "are invalid under the Fourteenth Amendment if they are not substantially related to permissible state interests."[70] The requirement of a substantial relationship is more demanding than the rational relationship associated with low level scrutiny and indicates that a mid-level test will be applied to classifications based on illegitimacy.

The Supreme Court decisions in *Labine*, *Trimble*, and *Lalli* demonstrate the development of the Court's equal protection analysis as it relates to laws that discriminate against illegitimate children. The Court has moved away from the extreme deference of *Labine* to the mid-level scrutiny of *Lalli*. The progression of these decisions indicates that state intestacy laws that discriminate against illegitimates will be held violative of equal protection if they are not carefully tailored to achieve important state interests. This Note will now address how and why a finding that a state's intestacy laws are unconstitutional should result in making some otherwise ineligible illegitimate children eligible for survivor's benefits under the Social Security Act presumptions of dependency.

III. PRESENTATION OF *Jones v. Schweiker*

A. Introduction

The statutory presumptions of dependency in the Social Security Act were validated by the Supreme Court in *Mathews v. Lucas*.[71] The *Lucas* footnote also suggested that one of these presumptions, section 416(h)(2)(A), may provide previously ineligible illegitimates with

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[67]*Id.* at 267-68.
[68]*Id.* at 271.
[69]*Id.* at 275-76.
[70]*Id.* at 265.
[71]427 U.S. 495 (1976).

a claim for benefits if their states' intestacy laws are found to be unconstitutional.[72] During the next term, in *Trimble v. Gordon*, the Court held that the Illinois intestacy law unconstitutionally discriminated against illegitimate children.[73] The combination of the *Lucas* footnote and the holding in *Trimble* raises the question of how section 416(h)(2)(A) should operate when a state intestacy law is found unconstitutional.

Four decisions have held that the unconstitutionality of the state intestate succession law in effect at the death of an illegitimate child's insured father makes the child eligible for benefits under section 416(h)(2)(A) of the Act.[74] These cases reason that, since *Trimble*, some types of discrimination against illegitimate children in state intestacy laws violate the equal protection clause of the fourteenth amendment and the due process clause of the fifth amendment when the laws are incorporated into a federal statute.[75] In one of these cases, *Allen v. Califano*,[76] the court explained that where state intestate succession laws are found to discriminte against illegitimate children in violation of equal protection,

> were the estates of the deceased fathers before the [state] courts, those courts would be required to permit the plaintiff children to inherit by reason of the equal protection clause. So viewing the question, these children are entitled to benefits under the Act because they would take intestate under the law as it would be applied by the state court.[77]

Only one case has held that the unconstitutionality of a state's intestate succession law would not qualify an illegitimate child whose father died while the law was unconstitutional for benefits under section 416(h)(2)(A) of the Act. Last term the Supreme Court agreed to hear that case: *Jones v. Schweiker*.[78]

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[72]*See supra* note 36 and accompanying text.

[73]430 U.S. 762, 776 (1977).

[74]Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981); White v. Harris, 504 F. Supp. 153 (C.D. Ill. 1980); Ramon v. Califano, 493 F. Supp. 158 (W.D. Tex. 1980); Allen v. Califano, 456 F. Supp. 168 (D. Md. 1978).

[75]*See, e.g., Allen*, 456 F. Supp. at 172-74.

[76]456 F. Supp. 168 (D. Md. 1978).

[77]*Id.* at 174.

[78]668 F.2d 755 (4th Cir. 1981), *vacated sub nom.* Jones v. Heckler, 103 S. Ct. 1763 (1983). Another decision not awarding benefits was Cox v. Harris, 486 F. Supp. 219 (M.D. Ga. 1980). The *Cox* holding was based on the district court's finding that the state intestacy law was constitutional. The court stated that "the Georgia intestacy law has been upheld as constitutionally sound, therefore, the posture of the case falls squarely within the holding of *Lucas*. This court is not now faced with the question outlined in footnote 18, *Lucas*." *Id.* at 222 n.2.

B. The Fourth Circuit's Opinion

Jones involves the consolidation of two actions from different states appealing the denial of surviving children's benefits under the Social Security Act.[79] One suit was filed by Marcia Simms, an illegitimate child conceived six to eight weeks prior to the death of her father. The other action was brought by three illegitimate children, Albert, Bridget, and Barbara Jones. In each action, the children sought to establish their dependence on their insured fathers, and their entitlement to benefits, under two statutory provisions.[80] The children were denied benefits in both actions, and they raised two contentions on appeal. The children's first contention was that the Secretary of Health and Human Services' decision that the children's fathers, at their deaths, were not contributing to the children's support was erroneous.[81] The Fourth Circuit concluded that in both cases substantial evidence supported the Secretary's determination and, therefore, affirmed that ruling.[82]

The second contention raised on appeal based a claim for benefits on section 416(h)(2)(A), which outlines one of the methods the Social Security Administration is to use in determining whether an applicant is a dependant child of an insured individual and thereby entitled to benefits. Under that section, the intestate succession law of the state in which the deceased parent was domiciled at his death is applied. If, under that law, the applicant would take personal property intestate as a child of the deceased, then, for the purposes of the Act, the applicant is considered to be a dependent of the deceased.[83]

The children in *Jones* argued that their states' intestate succession statutes were similar to the statute found unconstitutional in *Trimble* and, therefore, were unconstitutional as violative of the equal protection clause as they applied to illegitimate children. Because the state courts would, therefore, be required to allow the illegitimate children to inherit by intestate succession,[84] the children claimed that they must also qualify for social security benefits under section 416(h)(2)(A) of the Act.[85]

The court of appeals also rejected this contention, reasoning that in enacting section 416(h)(2)(A), Congress intended to extend benefits to those children whom the state legislatures deemed likely to have been dependent on the insured, as reflected in the state intestate succes-

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[79]The states involved were Mississippi and West Virginia.

[80]668 F.2d at 757.

[81]*Id.*

[82]*Id.* at 758.

[83]*See supra* note 15 and accompanying text.

[84]*See supra* notes 71-74 and accompanying text; *see also Jones*, 668 F.2d at 764 (dissenting opinion).

[85]668 F.2d at 757.

sion statutes.[86] In reaching this conclusion the court of appeals relied on the Supreme Court's decision in *Lucas* and quoted part of the *Lucas* opinion in which the Supreme Court found section 416(h)(2)(A) to be reasonably related to the likelihood of dependency:

> Similarly, we think, where state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death. For in its embodiment of the popular view within the jurisdiction of how a parent would have his property devolve among his children in the event of death, without specific directions, such legislation also reflects to some degree the popular conception within the jurisdiction of the felt parental obligation to such an "illegitimate" child in other circumstances, and thus something of the likelihood of actual parental support during, as well as after, life.[87]

The Fourth Circuit reasoned that because the state laws in question precluded these children from inheriting through their fathers by intestate succession, the state legislatures had not deemed the children, or others in similar positions, dependent.[88] Because the states had not deemed the children to be dependent, the court found the critical question to be "whether 'such law as would be applied' in § 416(h)(2)(A) means (a) all law, including that emanating from federal, constitutional, non-state sources, or (b) only law derived from state legislative enactments (or conceivably from the state's common law). It is obvious that only the latter was intended by Congress."[89] The court concluded that Congress intended the federal social security legislation to incorporate state intestacy law without any "involuntary modifications" that might be "compelled by the federal constitution."[90]

The Fourth Circuit went on to say that even if the intestate succession statutes were unconstitutional, and the children involved were able to join in taking from the estates of their fathers, this would not qualify them for benefits under the Social Security Act. The court reasoned that such a ruling would contravene the intent of Congress in adopting section 416(h)(2)(A) by granting benefits to illegitimates whom the state legislatures had not deemed dependent.[91] The court, therefore, never reached the issue of the constitutionality of the state intestacy laws.

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[86] *Id.* at 760.
[87] *Id.* (quoting Mathews v. Lucas, 427 U.S. 495, 514-15 (1976)).
[88] 668 F.2d at 760.
[89] *Id.* at 761.
[90] *Id.*
[91] *Id.*

C. *Evaluation and Criticism of the Court of Appeals Decision*

1. Congressional Intent.—The court of appeals erred in construing the intent of Congress in adopting section 416(h)(2)(A) to be the extension of benefits only to those children deemed dependent by the state legislatures, regardless of the constitutionality of those determinations. The history of the Act and federal constitutional considerations, not dealt with by the Fourth Circuit, lead to the conclusion that the reasoning of the court in *Jones* was seriously flawed. First, the *Jones* majority's interpretation of congressional intent is refuted by the history of the Social Security Act provisions that create the presumptions of dependency. The Fourth Circuit's interpretation restricts the number of illegitimate children eligible for benefits under section 416(h)(2)(A) to those children deemed likely to be dependent by state legislatures.[92] Congress, however, has consistently acted to increase the number of illegitimate children eligible for benefits, and it is unlikely that Congress intended such a restrictive reading of the section. Prior to 1960, section 416(h)(2) was comprised only of the presumption of dependency based on the intestate succession laws of the states. In that year, Congress added the section, now codified as section 416(h)(2)(B), which declares an applicant the child of the insured if the mother and father went through a marriage ceremony that would have been valid except for a legal impediment.[93] This amendment made it possible for some illegitimate children who would not qualify under section 416(h)(2)(A) to become elegible for benefits. Then, in 1965, Congress again amended this part of the Social Security Act by adding section 416(h)(3)(C),[94] which creates a presumption of dependency when the deceased insured individual had acknowledged the applicant to be his child, or when a court had declared the decedent to be the applicant's father, or when a court had ordered the decedent to help support the applicant because the applicant was his child.[95] Section 416(h)(3)(C) also provides for a child's eligibility when the applicant can prove paternity and demonstrate that the deceased insured either lived with or contributed to the support of the applicant at the time of the insured's death.[96] Thus, it can be seen that

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[92]*Id.*

[93]Social Security Amendments of 1960, Pub. L. No. 86-778, § 208(b), 74 Stat. 924, 951-52. The Social Security Act defines a legal impediment as: "only an impediment (i) resulting from the lack of dissolution of a previous marriage or otherwise arising out of such previous marriage or its dissolution, or (ii) resulting from a defect in the procedure followed in connection with such purported marriage." 42 U.S.C. § 416(h)(1)(B) (1976).

[94]Social Security Amendments of 1965, Pub. L. No. 89-97, § 339(a), 79 Stat. 286, 409-10.

[95]42 U.S.C. § 416(h)(3)(C)(i) (1976 & Supp. V 1981); *see supra* note 15.

[96]42 U.S.C. § 416(h)(3)(C)(ii) (1976 & Supp. V 1981).

Congress has acted consistently to expand the number of illegitimate children eligible for benefits under the Social Security Act. These amendments do not support the congressional intent attached to section 416(h)(2)(A) by the court of appeals in *Jones*, which severely limits the number of illegitimate children eligible for benefits. Given the trend of Congress in the enactment of the amendments described above, it is much more likely that Congress would prefer a broad reading of section 416(h)(2)(A) which would increase the number of eligible illegitimate children.[97]

The United States Constitution provides a second basis for questioning the *Jones* majority's interpretation of congressional intent. It is less obvious than indicated by the *Jones* court that Congress intended to incorporate only state law in section 416(h)(2)(A). Section 416(h)(2)(A) states that the Social Security Administration shall "apply such law as would be applied in determining the devolution of intestate personal property . . . by the courts of the State in which [the insured] was domiciled at the time of his death" in determining whether the presumption of dependency has been fulfilled.[98] It is unlikely that the Fourth Circuit would have concluded that Congress intended to adopt a state intestate succession law allowing illegitimate white children to inherit from their fathers, but preventing illegitimate black children from doing so because it reflects the popular view within the jurisdiction[99] as to which children are likely to be dependent. To attribute such an intention to Congress seems ludicrous, yet it is not significantly different from the *Jones* court's interpretation of congressional intent. Regardless of whether a state intestacy law violates the equal protection clause because it is found to discriminate against blacks, under strict scrutiny, or illegitimates, under an intermediate level of scrutiny, the United States Constitution refutes a conclusion that Congress intended to incorporate an unconstitutional statute as a basis for determining eligibility for federal benefits.

The supremacy clause of the United States Constitution states that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding."[100] Under the supremacy clause the state courts are bound to consider federal constitutional requirements when interpreting and applying their state laws.[101] Thus, if the courts of the states involved in *Jones* were called upon to determine the constitu-

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[97]*See* Jones v. Schweiker, 668 F.2d at 766 (Bryan, J., dissenting).

[98]42 U.S.C. § 416(h)(2)(A) (1976); *see supra* note 15.

[99]668 F.2d at 761.

[100]U.S. CONST. art. VI, cl. 2.

[101]Smith v. O'Grady, 312 U.S. 329 (1941).

tionality of their state intestacy laws, those courts would be obligated to evaluate those laws in light of the equal protection standards enunciated by the Supreme Court in *Trimble v. Gordon*[102] and *Lalli v. Lalli*.[103] If those laws were found to discriminate unconstitutionally against the illegitimate children involved in *Jones*, the Supreme Court's dicta in the *Lucas* footnote indicates that those children would be eligible for benefits under section 416(h)(2)(A).[104] That dicta and its compelling logic have been followed by at least four courts.[105] In *Allen v. Califano*,[106] the court stated:

> Section 416(h)(2)(A) looks to the law that would be applied by the state of the wage earner's domicile at death. In these cases the state laws referred to are invalid. Thus, were the estates of the deceased fathers before the [state] courts, those courts would be required to permit the plaintiff children to inherit by reason of the equal protection clause. So viewing the question, these children are entitled to benefits under the Act because they would take intestate under the law as it would be applied by the state court. Accordingly, they meet the statutory qualification criteria found in 42 U.S.C. § 416(h)(2)(A).[107]

It is clear from both the wording of section 416(h)(2)(A) and the interpretation given that wording by the courts, that the majority in *Jones* erred in holding that Congress intended to adopt state law unaffected by federal constitutional considerations. Because the validity of state law is conditioned upon meeting federal constitutional requirements, the duty under section 416(h)(2)(A) of the Secretary to "apply such law as would be applied . . . by the courts of the State"[108] compels the conclusion that Congress intended the Secretary to apply state intestacy laws as modified by federal constitutional law.

2. Congressional Adoption of Unconstitutional State Laws.—In *Jones*, the Fourth Circuit concluded that Congress intended to adopt the state intestate succession laws, regardless of their constitutionality, as one method of determining dependency. There are grave doubts whether the adoption of an unconstitutional law would itself be constitutional. While the fifth amendment, unlike the fourteenth amend-

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[102]430 U.S. 762 (1977); *see supra* notes 51-64 and accompanying text.

[103]439 U.S. 259 (1978); *see supra* notes 65-70 and accompanying text.

[104]*See supra* text accompanying note 36.

[105]Fulton v. Harris, 658 F.2d 641 (8th Cir. 1981); White v. Harris, 504 F. Supp. 153 (C.D. Ill. 1980); Ramon v. Califano, 493 F. Supp. 158 (W.D. Tex. 1980); Allen v. Califano, 456 F. Supp. 168 (D. Md. 1978); *see also* Jones v. Schweiker, 668 F.2d 755, 764 (4th Cir. 1981) (Bryan J., dissenting).

[106]456 F. Supp. 168 (D. Md. 1978).

[107]*Id.* at 173-74.

[108]42 U.S.C. § 416(h)(2)(A) (1976).

ment, does not contain an equal protection clause, the Supreme Court has concluded that:

> the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.[109]

If the Supreme Court were faced with the adoption of an unconstitutional state law by a federal statute, it is likely that the federal statute would be found unconstitutional as violative of the due process clause of the fifth amendment. *Eskra v. Morton*[110] provides useful insight in an analogous situation.

Eskra involved the incorporation of state intestate succession laws into federal statutes. In *Eskra*, Constance, a Chippewa Indian and an illegitimate child, sought review of a decision of the Bureau of Indian Affairs that she was not eligible to inherit part of the estate of her great aunt Blue Sky.[111] According to the federal statutes involved in the case,[112] Blue Sky's interest in Indian trust land in Wisconsin would pass to her heirs under the laws of Wisconsin.[113] Thus, the share Constance would take from her great aunt's estate under Wisconsin intestacy law, determined the share she would take from her aunt's interest in the Indian trust land. Under the Wisconsin law then in effect, an illegitimate child could inherit from but not through her mother.[114] In a decision by Mr. Justice Stevens (then Circuit Judge), the Court of Appeals for the Seventh Circuit found no legitimate state interest to justify the state intestacy law's discrimination against illegitimates in Constance's position.[115] The court stated that all persons within the jurisdiction of every state and of the United States must be given equal protection of the laws.[116] The Seventh Circuit concluded that the due process clause of the fifth amendment prevented the federal government from discriminating against Constance on the basis of the unjustifiably discriminatory state law. The

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[109]Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (footnote omitted).

[110]524 F.2d 9 (7th Cir. 1975).

[111]*Id.* at 10-11.

[112]25 U.S.C. § 348 (1976 & Supp. V 1981) and 25 U.S.C. § 464 (1970) (current version at 25 U.S.C. § 464 (1976 & Supp. V 1981)).

[113]524 F.2d at 11.

[114]*Id.*

[115]*Id.* at 14-15.

[116]*Id.* at 13.

court held that she was, therefore, entitled to share in her great aunt's estate equally with her legitimate sisters.[117]

Eskra provides the basics for a convincing argument that Congress is prohibited by the fifth amendment from incorporating unconstitutional state intestacy laws into section 416(h)(2)(A). Classifications in state intestacy laws that discriminate against illegitimates will be found to violate the equal protection clause of the fourteenth amendment when the statutes are not "substantially related to the important state interests the statute is intended to promote."[118] Similarly, the due process clause of the fifth amendment prohibits Congress from discriminating against illegitimates unless it is able to justify its actions under the mid-level test applicable to classifications based on illegitimacy. In *Eskra*, the court found the classification in the state intestacy law unconstitutional, and held that the due process clause prevented the federal government from discriminating against the illegitimate child by incorporating the state law.[119] It follows that the federal government is prohibited from discriminating against illegitimate children by incorporating unconstitutional state intestacy laws into section 416(h)(2)(A). Upon concluding that the classifications in the state intestate succession law could not be justified, the court in *Eskra* held that the illegitimate child was entitled to the same treatment accorded her legitimate sisters.[120] The logical conclusion is that if the intestacy laws involved in *Jones* were found to discriminate unconstitutionally against illegitimate children, the children involved in *Jones* would have to be treated as legitimate children for purposes of intestate succession. Therefore, those children would be eligible to inherit from their fathers' estates under the state intestacy law, and would be eligible for benefits under section 416(h)(2)(A).

The court in *Jones* attempted to distinguish *Eskra* by looking at the congressional purpose underlying the federal statutes in each case.[121] The *Jones* majority reasoned that the congressional purpose underlying the federal statute involved in *Eskra* was to distribute Indian trust land in the same manner that the land of non-Indians was distributed under state intestacy laws. "Congress obviously desired and expected exactly the same result under two interrelated intestate succession schemes."[122] Thus, if a state intestacy law were declared unconstitutional and an illegitimate child was, therefore, allowed to inherit from a non-Indian, the child should also be allowed to inherit from an Indian who owned property in the state. The *Jones* majority

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[117]*Id.* at 15.

[118]Lalli v. Lalli, 439 U.S. at 275-76; *see supra* notes 65-70 and accompanying text.

[119]524 F.2d at 15.

[120]*Id.*

[121]668 F.2d at 761 n.17.

[122]*Id.*

reasoned that *Eskra* provided for a result "*not intended* by the Wisconsin legislature . . . in order to maintain parity" between two intestate succession schemes as Congress intended.[123] In contrast, a determination that a state intestacy statute is unconstitutional would not affect who qualifies under section 416(h)(2)(A) because it is only the state legislature's opinion of which children are dependent that Congress adopted. The majority's analysis is unpersuasive for two reasons. First, it is based on its misunderstanding of Congress' intent in enacting section 416(h)(2)(A), as discussed in the previous section. Second, it fails to recognize that Congress is prohibited by the fifth amendment from incorporating an unconstitutional statute, even if that was its intention.

IV. On Remand to the Fourth Circuit

The Supreme Court vacated and remanded *Jones* to the Fourth Circuit.[124] In remanding the case, the Supreme Court suggested further consideration in light of changes in the Mississippi intestate succession statute and a West Virginia state court decision.[125]

Of relevance to the Jones children, Mississippi has amended its intestate succession statute to allow illegitimate children to inherit from their fathers if there has been an adjudication of paternity.[126] That adjudication may take place after the death of the intestate, and the statute is given retroactive effect by allowing claims existing prior to the amendment to be brought within three years of its effective date.[127] Because the insured was found by the Secretary of Health and Human Services to be the father of the three Jones children,[128] it is probable that a proceeding under the amended Mississippi statute would result in the same finding. If the children brought an action, as authorized by the statute, seeking and obtaining an adjudication of paternity, they would be able to inherit under the state intestacy law. Even under the Fourth Circuit's reasoning, if the children can inherit under the state intestacy law they are eligible for benefits under section 416(h)(2)(A) of the Social Security Act because the state legislature has made the value judgment that these children should

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[123]*Id.*

[124]Jones v. Heckler, 103 S. Ct. 1763 (1983). The case name was changed to indicate the new Secretary of Health and Human Services, Margaret H. Heckler. The case was reheard by the Fourth Circuit in July, 1983, but no decision had been issued as of 1983.

[125]103 S. Ct. at 1763.

[126]Miss. Code Ann. § 91-1-15(2) (Supp. 1982).

[127]*Id.* The statute allows claims existing prior to its effective date, July 1, 1981, to be brought within three years. Thus, the Jones children would have until July 1, 1984 to bring an action to take their intestate share from their purported father.

[128]Jones v. Schweiker, 668 F.2d at 758.

be considered dependent.[129] It is likely, therefore, that the Fourth Circuit will declare the Jones children eligible to receive benefits under section 416(h)(2)(A).

The situation of Marcia Simms, as affected by a West Virginia state court decision, may not provide the Fourth Circuit with the same guidance for reversing its earlier holding. On remand, the Supreme Court called on the Fourth Circuit to reconsider the case in light of *Adkins v. McEldowney*.[130] In that case, the highest West Virginia court found the state intestacy law unconstitutional as applied to illegitimate children. The West Virginia intestacy law allowed illegitimates to inherit from their mothers but not from their fathers,[131] while legitimate children could inherit from both parents.[132] The court found the statute violative of the equal protection clause of the fourteenth amendment using intermediate scrutiny.[133] It also held that under the equal protection clause of the West Virginia state constitution, illegitimacy is a suspect classification and subject to strict scrutiny.[134] Thus, the state intestate succession statute was found to violate both the state and federal equal protection clauses.

The West Virginia court then discussed the effect of the finding of unconstitutionality upon illegitimate children's inheritance rights. The court stated that the trial courts[135] erred in concluding that the statute's unconstitutionality required them to resort to the common law and deny any intestate inheritance rights to illegitimate children.[136] The court concluded that because the legislature had demonstrated an intent to benefit some illegitimate children, by allowing them to inherit from their mothers, the doctrine of neutral extension was appropriate.[137] Under that doctrine, the court held that illegitimate children must be allowed to inherit from both their mothers and their fathers.

Under the *Adkins* decision, Marcia Simms would be eligible to inherit from her father. That case and its result do not, however, necessarily qualify her for social security benefits under the Fourth Circuit's reasoning in *Jones*. The *Adkins* court found the intent of the state legislature to allow illegitimate children to inherit controlling,

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[129]*See supra* notes 83-88 and accompanying text.

[130]280 S.E.2d 231 (W. Va. 1981).

[131]W. VA. CODE § 42-1-5 (1982).

[132]*Id.* § 42-1-1.

[133]280 S.E.2d at 232-33.

[134]*Id.* at 233. The court had also found gender-based classifications to be suspect and entitled to strict scrutiny under the state constitution. Peters v. Narick, 270 S.E.2d 760 (W. Va. 1980).

[135]*Adkins* involved three cases consolidated on appeal.

[136]280 S.E.2d at 233.

[137]*Id.*

although the law was unconstitutional as written.[138] Under the Fourth Circuit's reasoning, however, the West Virginia legislature's intent to make some illegitimate children eligible to inherit does not mean that the state legislature made the value judgment that Marcia should be deemed dependent. The Fourth Circuit could find that, regardless of the state legislature's intent, the *Adkins* decision makes Marcia eligible to inherit from her father's intestate estate and that she is, therefore, eligible for benefits under section 416(h)(2)(A). It is equally reasonable to read the Fourth Circuit's opinion in *Jones* as leading to the conclusion that the West Virginia legislature has not deemed Marcia to be dependent and that she is not, therefore, eligible for benefits under section 416(h)(2)(A).[139] Such a conclusion requires the court not only to find that Congress intended to adopt a state law which violates both federal and state constitutional requirements as a basis for determining eligibility for federal benefits, but also to approve such an intention even though it violates the due process clause of the fifth amendment. Such a holding would, for the reasons discussed in the preceeding section, be one degree less correct than the Fourth Circuit's original opinion in *Jones*.

V. CONCLUSION

The Social Security Act has created several presumptions of dependency which, if met, will entitle a child to survivor's benefits. One of those presumptions arises if a child inherits personal property from the deceased insured parent's estate according to the applicable state intestate succession law. Several state intestate succession laws have been found unconstitutionally discriminatory against illegitimate children. To prevent illegitimate children from receiving social security benefits on the basis of these unconstitutional state laws contravenes the intent of Congress to broaden the group of children eligible for such benefits. Furthermore, the incorporation into a federal statute of an unconstitutional state law as a basis for determining eligiblity for federal benefits is itself prohibited by the fifth amendment. The majority in *Jones* erred in holding that the denial of benefits to the children involved in *Jones* did not deny them equal protection of the law. On remand the Fourth Circuit should follow the reasoning of *Eskra*, and hold that if the state statutes involved are unconstitutional, the children are automatically eligible for benefits under section 416(h)(2)(A). If the court is unwilling to reach such a holding, it should find the Jones children eligible under their state's amended intestacy law, which allows them to inherit from the insured's intestate estate. The

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[138] *Id.*

[139] *See supra* notes 83-88 and accompanying text; *see also Jones*, 668 F.2d at 760-61.

court should also find Marcia Simms eligible for benefits under her state's case law. The *Adkins* decision makes Marcia eligible to inherit from her father's intestate estate and she, therefore, falls within the plain wording of section 416(h)(2)(A).

TIMOTHY L. STEWART

The Right of Access and Juvenile Delinquency Hearings: The Future of Confidentiality

I. INTRODUCTION

As the media has sought to provide greater coverage of the judicial process in recent years, the courts have been faced with the difficult task of resolving the conflict between the first amendment rights of the press[1] and the sixth amendment rights of an accused[2] to a fair trial.[3] In resolving this conflict, the Supreme Court has recognized a constitutional right of access for the public and the press to attend criminal trials that must be balanced against the constitutionally protected rights of the accused and the state's interests in closure.[4] Although the Court's holdings on these right of access cases have been narrowly framed,[5] the language of the various decisions

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[1]The first amendment provides in part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[2]The sixth amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

[3]*See, e.g.*, Chandler v. Florida, 449 U.S. 560 (1981) (permitting television, radios, and still photography coverage of criminal trials notwithstanding the objections of the defendants); Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (invalidating a court's "gag order" in a criminal trial as a prior restraint on the press); Branzburg v. Hayes, 408 U.S. 665 (1972) (defendant's right to a fair trial overrides news reporter's claim of a first amendment right to not reveal confidential sources); Sheppard v. Maxwell, 384 U.S. 333 (1966) (defendant was deprived of a fair trial because of prejudicial publicity); Irwin v. Dowd, 366 U.S. 717 (1961) (first reversal of a state conviction due to prejudicial publicity). *See generally* J. NOWAK, R. ROTUNDA & J. NELSON, CONSTITUTIONAL LAW 910-23 (2d ed. 1983).

[4]*See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (plurality opinion); *cf.* Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 824 (1984) (recognizing a constitutionally protected right of access to voir dire proceedings). For an in depth discussion of these cases, see *supra* notes 78-107, 46-77, 109-22 and accompanying text.

[5]Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 n.27 (1982) ("We emphasize that our holding is a narrow one . . . ."); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 558 (1980) ('The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.").

contains broad implications that the access right may not be limited to the context of criminal trials.[6]

One area to which the right of access could be extended is juvenile delinquency hearings.[7] Juvenile delinquency hearings have traditionally been confidential and closed to the public and the press in an effort to promote rehabilitation rather than punishment.[8] The development of the newly articulated constitutional right of access, however, has created a "disturbing paradox" in cases where minors are involved.[9] At present, a state is permitted to mandate the closure of all proceedings to protect a juvenile charged with rape,[10] but, a state is not permitted to mandate the closure of part of a criminal trial to protect a minor who was a victim of a rape.[11] Thus, the juvenile offender is currently afforded more protection from the adverse effects of publicity than the juvenile victim.[12] With the increase in juveniles committing acts which would be crimes if committed by adults,[13] it is likely that the press will be making an increased effort to obtain access

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[6]*See, e.g.,* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 582 (1980) (Stevens, J., concurring) ("This is a watershed case. . . . [N]ever before has [the Court] squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."); *id.* at 599 (Stewart, J., concurring) ("[T]he First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal.").

[7]This Note recognizes that juvenile courts deal with many types of cases concerning delinquency, neglect, and dependency. The discussion herein, however, relates only to juvenile delinquency hearings, i.e., hearings on acts committed by a minor that would be crimes if committed by an adult. The discussion does not apply to status offenses—conduct illegal only for children, e.g., truancy or incorrigibility.

[8]*See generally* Jonas, *Press Access to the Juvenile Courtroom: Juvenile Anonymity and the First Amendment,* 17 COLUM. J.L. & SOC. PROBS. 287, 290-92, 295-97 (1982); Note, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation,* 65 IOWA L. REV. 1471, 1471 (1980); Comment, *Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of "Conditional Access,"* 13 U.C.D. L. REV. 123, 126-29 (1979).

[9]*See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 612 (1982) (Burger, C.J., dissenting).

[10]*See In re* J.S., 140 Vt. 458, 438 A.2d 1125 (1981) (construing the legislative intent of VT. STAT. ANN. tit. 33, § 651(c), (d) (1981) as specifically prohibiting the media and the general public from attending juvenile hearings or reporting what transpired there); N.H. REV. STAT. § 169-C:14 (Supp. 1983).

[11]Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 n.27 (1982); *id.* at 612 (Burger, C.J., dissenting).

[12]*See id.* In many states, juvenile offenders are also given the additional protection of confidential records. *See, e.g.,* IND. CODE § 31-6-8-1, -1.2, -1.5 (1982).

[13]PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CARE 1 (1967). [hereinafter cited as TASK FORCE]. The task force called juvenile crime "the single most pressing and threatening aspect of the crime problem in the United States." *Id. See also* L. SIEGEL & J. SENNA, JUVENILE DELINQUENCY THEORY, PRACTICE, AND LAW 271 (1981); Jonas, *supra* note 8, at 305-06.

to more juvenile proceedings. This will force the courts to examine the issue of whether the public's right of access to criminal trials should be expanded to include juvenile proceedings.

Despite the juvenile justice system's philosophy that confidentiality promotes rehabilitation, there are dangers in a court of justice conducting all of its proceedings strictly in private.[14] The reasons for open criminal trials are as applicable to juvenile courts as to others.[15] The Supreme Court has acknowledged that there is little to distinguish a juvenile adjudicatory hearing from a criminal prosecution,[16] in extending most of the constitutional protections accorded criminal defendants to juvenile respondents.[17] Moreover, several studies have concluded that the present juvenile justice system has failed to achieve its dual goals of preventing juvenile crime and rehabilitating juvenile offenders.[18] Therefore, the benefits to the public of open juvenile proceedings would appear to outweigh the state's interests in closed proceedings. Thus, no compelling basis exists for treating juvenile proceedings differently than criminal trials for the purposes of the right of access.

This Note will examine the development of the public's right of access to attend criminal trials and analyze the rationale underlying this constitutional right. This rationale will then be applied to juvenile delinquency hearings to suggest that the first amendment right of access should be extended to include such hearings. The impact on the juvenile justice system if the right of access is so extended will

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[14]The right to a public trial reflects the "traditional Anglo-American distrust for secret trials." *In re* Oliver, 333 U.S. 257, 268 (1948). The distrust for secret trials arose from the notorious abuses of the Spanish Inquisition, the English Court of Star Chamber, and the French monarchy's abuse of the lette de cachet. *See id.* at 268-69. The public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *Id.* at 270, *quoted in* Gannett Co. v. DePasquale, 443 U.S. 368, 380 (1979).

[15]Open trials enhance the integrity and quality of criminal trials and promote confidence in the legal system by "[permitting] the public to participate in and serve as a check upon the judicial process." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982). For a more detailed discussion of the benefits of public trials, see *infra* notes 56, 190-96 and accompanying text.

[16]Breed v. Jones, 421 U.S. 519, 529 (1975); McKeiver v. Pennsylvania, 403 U.S. 528, 541 (1971); *In re* Winship, 397 U.S. 358, 365 (1970); *In re* Gault, 387 U.S. 1, 50 (1967).

[17]*See* Breed v. Jones, 421 U.S. 519, 541 (1975) (recognizing due process guarantees juveniles the right to protection against double jeopardy); *In re* Winship, 397 U.S. 358, 368 (1970) (recognizing due process guarantees juveniles the right to a standard of proof beyond a reasonable doubt); *In re* Gault, 387 U.S. 1, 30 (1967) (recognizing due process guarantees juveniles the right to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, and the right against self-incrimination).

[18]*See generally* TASK FORCE, *supra* note 13, at 7 and sources cited therein.

be analyzed and a description of the possible effects on juvenile court procedures will be provided. Finally, this Note will examine the various statutory schemes on juvenile court access currently being used by the states and analyze how these statutes will have to be revised if the courts extend the right of access to juvenile proceedings.

II. THE DEVELOPMENT OF THE RIGHT OF ACCESS

The constitutional right of access to criminal trials developed[19] to counter the limitations on the press imposed by the courts' efforts to safeguard the accused's due process right to a fair trial from the effects of prejudicial pretrial publicity.[20] In the landmark case of *Sheppard v. Maxwell*,[21] the Supreme Court held that the defendant was deprived of a fair trial because of "the massive, pervasive and prejudicial publicity that attended his prosecution."[22] The Court noted "that unfair and prejudicial news comment on pending trials [had] become increasingly prevalent"[23] and found that trial judges have an affirmative constitutional duty to ensure that the accused's right to fair trial is not jeopardized by the effects of prejudicial publicity.[24]

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[19]Some scholars suggest that the right of access had its beginnings in such cases as Zemel v. Rusk, 381 U.S. 1 (1965) (rejecting first amendment claim of right to gather information, in upholding State Department decision to deny petitioner a passport to travel to Cuba); Branzburg v. Hayes, 408 U.S. 665 (1972) (news reporter's right to gather information and protect confidential sources was limited by the sixth amendment rights of an accused); Saxbe v. Washington Post Co., 417 U.S. 843 (1974) (upholding federal prison regulation restricting access to prisons); Pell v. Procunier, 417 U.S. 817 (1974) (upholding similar regulation to state prisons). Jonas, *supra* note 8, at 334-35; J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 3, at 905-22. These writers note the broad implications of the right of access in terms of gathering information about the operation of the government. This Note only deals with the right of access in the context of the right to attend judicial proceedings. Therefore, the discussion of the development of the right of access herein is focused on and limited to cases that led to the Court's recognition of the right to attend criminal trials.

[20]*See generally*, sources cited *supra* note 3.

[21]384 U.S. 333 (1966).

[22]*Id.* at 335. The following quote from the opinion of Judge Bell of the Ohio Supreme Court provides an indication of the massive publicity surrounding Sheppard's trial:

> "Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparalleled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life."

Id. at 356 (quoting State v. Sheppard, 165 Ohio St. 293, 294, 135 N.E.2d 340, 342 (1956)).

[23]384 U.S. at 362.

[24]*Id.* at 362-63. The court outlined some alternative methods to protect the accused's rights to a fair trial from the effects of pretrial publicity such as continuing the case, transferring it to another county, or granting a new trial, if publicity during the trial jeopardized its fairness. *Id.* at 363.

In an attempt to prevent the prejudice at its inception, courts increased their use of protective orders banning publication of information on criminal trials at least until a jury was impanelled.[25] These efforts to prohibit what information the press could publish concerning criminal trials[26] were determined to be unconstitutional, in *Nebraska Press Association v. Stuart*,[27] as prior restraints on the press.[28] Therefore, as an alternative to protective orders, some courts began closing portions of their proceedings to the public to protect against virulent publicity.[29] This denial of public access to criminal proceedings led to the development of the right of access.[30]

Gannett Co. v. DePasquale[31] was the first case that raised the issue of whether members of the public have an independent constitutional right to insist upon access to judicial proceedings.[32] In a five to four decision,[33] the Supreme Court rejected a newspaper publisher's attack on an order barring the public and the press from a pretrial sup-

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[25]*See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 3, at 918.

[26]A slightly different issue was presented to the Court in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). *Cox* involved a suit by the father of a 17-year-old rape victim against a news reporter, who had learned the victim's name by examining the indictments which were public records. The reporter's television station broadcast the victim's name in violation of a Georgia statute that made such conduct a misdemeanor. GA. CODE ANN. § 26-9901 (1972). The Supreme Court held that where the press lawfully obtains information, the state cannot punish the press for publishing it. 420 U.S. at 471. *See also* Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977) (per curiam).

[27]427 U.S. 539 (1976).

[28]*Id.* at 570. *See also* Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (Powell, Circuit Justice 1974) (staying a protective order in a criminal case because there was no showing of a threat to a fair trial or that other methods would be insufficient to protect the accused's rights).

[29]*See* J. NOWAK. R. ROTUNDA & J. YOUNG, *supra* note 3, at 920; *cf.* Gannett Co. v. DePasquale, 443 U.S. 368 (1979) (pretrial suppression hearing closed to the public).

[30]*See generally* Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 533 (1980) (plurality opinion).

[31]443 U.S. 368 (1979).

[32]*Id.* at 370-71. Previous cases had only dealt with the publication issues of prior restraint on information already in the possession of the press, *see* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); *see supra* note 28 and accompanying text, or the chilling effect of subsequent punishment for publication of information lawfully obtained. *See* Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975); *see supra* note 26. In *Gannett*, the press argued that it had a right of access to obtain information about judicial proceedings that was constitutionally protected from governmental interference. 443 U.S. at 391.

[33]443 U.S. at 368. Justices Blackmun, Brennan, Marshall, and White dissented on the merits. Justice Stewart wrote the opinion of the Court joined by Chief Justice Burger and Justices Powell, Rehnquist, and Stevens. Chief Justice Burger and Justices Powell and Rehnquist each wrote separate concurring opinions. All nine justices agreed that the case was not moot.

pression hearing. The Court held that neither the press nor the general public has any independent constitutional right to insist upon access to pretrial judicial proceedings when the accused, the prosecutor, and the trial judge all agree to a closed hearing in order to assure a fair trial.[34]

Justice Stewart wrote the opinion of the Court. His approach to the petitioner's claim that the public had an independent constitutional right to attend criminal trials was to explore the text and history behind the public trial provision of the sixth amendment as a possible source for such a right.[35] Stewart found that the sixth amendment right to a public trial is personal to the accused[36] and that nowhere in the Constitution is there any mention of a right of access to criminal trials on the part of the public.[37] Thus, he concluded that "members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials."[38]

At the very beginning of the opinion, Justice Stewart framed the issue of this case very narrowly and limited it to pretrial judicial proceedings;[39] however, throughout the opinion he referred to the broader issue of the right of access to all portions of criminal trials.[40] Near the end of his opinion, Stewart came back to this distinction

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[34]*Id.* at 394.

[35]*Id.* at 379-91.

[36]*Id.* at 387. Justice Stewart relied on the language in *In re* Oliver, 333 U.S. 257, 270 & n.5 (1948) (e.g., public trial guarantee "is for the protection of all persons *accused* of crime" (emphasis added)), and Estes v. Texas, 381 U.S. 532, 538-39 (1965) (e.g., "The purpose of the requirement of a public trial was to guarantee that the *accused* would be fairly dealt with and not unjustly condemned." (emphasis added)), to support his the public. 443 U.S. at 380-81. Justice Stewart was careful to point out, however, that "[w]hile the Sixth Amendment guarantees to a defendant in a criminal case the right to a public trial, it does not guarantee the right to compel a private trial." *Id.* at 382.

[37]443 U.S. at 379. Justice Stewart conceded that there was a strong societal interest in public trials, but found there was also "a strong societal interest in other constitutional guarantees extended" to a defendant in a criminal trial. *Id.* at 383. He pointed out that the "[r]ecognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public." *Id.* at 383. Just as the public cannot demand a jury trial or other sixth amendment rights when the defendant, the prosecutor, and the trial judge consent to the defendant's waiver of that right, the public cannot compel a public trial when the parties and the trial judge agree to closure. Stewart concluded that in an adversary system of criminal justice, "the public interest is protected by the participants in the litigation." *Id.* at 384.

[38]*Id.* at 391.

[39]*Id.* at 370-71.

[40]*Id.* at 379, 381, 383, 384-87, 391, 392. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 601-02 (1980) (Blackmun, J., concurring) ("No fewer than 12 times in the primary opinion in [*Gannett*], the Court (albeit in what seems now to have become clear dicta) observed that its Sixth Amendment closure ruling applied to the *trial* itself.").

and argued that even if the sixth amendment could be viewed as embodying a common law right of the public to attend criminal trials, this case involved a *pretrial* proceeding and the history of American and English common law demonstrated that the public had no such right to attend these proceedings.[41]

The *Gannett* case left many courts uncertain of how to interpret the holding on the right of access.[42] The Court had split five to four with five of the justices writing separate opinions, each taking a different approach to the question.[43] Moreover, the majority opinion did not specifically address the issue of whether the public has a right of access based in the first amendment.[44] To clear up some of the

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[41]443 U.S. at 387-91.

[42]For a list of commentators and journalists confused by the Court's decision in *Gannett*, see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 603 nn.1, 2 (1980) (Blackmun, J., concurring).

[43]Chief Justice Burger joined in the opinion of the Court, but wrote a separate concurring opinion to emphasize that the decision only applied to pretrial hearings and did not extend to criminal trials. 443 U.S. at 394-97 (Burger, C.J., concurring).

Justice Powell also wrote a separate concurring opinion to address the question that Justice Stewart reserved—whether the public had a constitutional right to attend the pretrial suppression hearing protected by the first and fourteenth amendments. Justice Powell found that the petitioner's reporter had an interest protected by the first and fourteenth amendments in being present at the pretrial hearing; however, the trial judge properly balanced this right to a fair trial and reached the correct result in this case. *Id.* at 403 (Powell, J., concurring).

Justice Rehnquist's concurring opinion emphasized his view that the public and the press have no constitutional right of access to judicial or other governmental proceedings under the sixth, first, or fourteenth amendments. *Id.* at 403-05 (Rehnquist, J., concurring).

Justice Blackmun, writing for the four dissenters, analyzed the history and development of the common law practice of public trials in England and America and focused on this history at the time of the adoption of the sixth amendment to conclude that a societal interest in public trials exists separate from, and at times in opposition to, the interests of the accused, and that this interest is protected by the sixth and fourteenth amendments. *Id.* at 432-33 (Blackmun, J., dissenting). After determining that a constitutionally protected public right to attend criminal trials existed, the dissent found that a pretrial suppression hearing is the "close equivalent [to a] trial on the merits for the purposes of applying the public-trial provision of the Sixth Amendment." *Id.* at 436. The dissent concluded that "the Sixth and Fourteenth Amendments prohibit a State from conducting a pretrial suppression hearing in private, even at the request of the accused, unless full and fair consideration is first given to the public's interest, protected by the amendments, in open trials." *Id.*

[44]443 U.S. at 392. Even after the Supreme Court's decision, in Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (plurality opinion), recognized a first amendment public right to attend criminal trials, some state courts have continued to follow the holding in *Gannett* on the issue of the public's access to preliminary hearings. *See, e.g.*, San Jose Mercury-News v. Municipal Court, 3 Cal.3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982); Press-Enterprise Co. v. Superior Court, 198 Cal. Rptr. 241 (Cal. Ct. App. 1984).

questions left by *Gannett*, exactly one year later, the Court heard the case of *Richmond Newspapers, Inc. v. Virginia*.[45]

Richmond Newspapers was the first case in which the Court found a constitutionally protected right of access to criminal trials in the public.[46] The Court was in substantial agreement on the issue of whether the public right of access to attend criminal trials was protected by the Constitition;[47] however, each of the justices seemed to have his own view of the nature and scope of that right. The result was a plurality opinion with seven of the justices writing separate opinions.

Richmond Newspapers evolved from a Virginia state court's fourth attempt to try a defendant for murder.[48] Before the trial began, counsel for the defendant moved that the trial be closed to the public.[49] Relying on a statute that empowered the trial judge to exclude a public from all criminal trials at his discretion,[50] the trial judge ordered the courtroom closed. The petitioner, a local newspaper whose reporters were among those denied access to the courtroom, unsuccessfully challenged the order and was eventually granted certiorari by the United States Supreme Court.[51]

Chief Justice Burger wrote the plurality opinion for the Court. The narrow question presented by this case, in his view, was "whether the right of the public and the press to attend criminal trials is guaranteed under the United States Constitution."[52] Burger began his

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[45]448 U.S. 555 (1980) (plurality opinion).

[46]*Id.* at 580.

[47]*Id.; id.* at 582 (White, J., concurring); *id.* at 584 (Stevens, J., concurring); *id.* at 585 (Brennan, J., concurring); *id.* at 599 (Stewart, J., concurring); *id.* at 604 (Blackmun, J., concurring). Seven of the justices concurred in the judgment of the Court, but only Justices White and Stevens joined in Chief Justice Burger's plurality opinion, and each of them also wrote a separate concurring opinion. Only Justice Rehnquist dissented. Thus, the opinion was seven to one. Justice Powell did not take part in the consideration or decision of the case.

[48]The defendant's conviction after the first trial was reversed on appeal. His second trial ended in a mistrial. The third trial also ended in a mistrial "because a prospective juror had read about [the defendant's] previous trials in a newspaper and had told other prospective jurors about the case before the retrial began." 448 U.S. at 559.

[49]Presumably, the defense counsel's reason for requesting that the trial be closed was to ensure that information concerning which witnesses testified to certain facts would not be revealed to other potential witnesses by any member of the public during a recess. *See id.* at 559-60.

[50]VA. CODE § 19.2-266 (Supp. 1980) provided in part:

> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the Court may, in its discretion, exclude from the trial any person whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

[51]448 U.S. at 560-63.

[52]*Id.* at 558.

inquiry by distinguishing the *Gannett* case as limited to pretrial suppression hearings.[53] The Chief Justice reviewed the history of open criminal trials which preceeded the adoption of the Constitution and the Bill of Rights,[54] and found that this history demonstrated that criminal trials "have long been presumptively open."[55] Open trials were said to enhance the integrity and quality of criminal trials, promote confidence in the judicial system, provide a therapeutic value to the community, and serve as a form of legal education.[56] Burger found that "this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past"[57] compelled the conclusion "that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."[58]

The Chief Justice then addressed the question of "whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials."[59] Focusing on the freedoms of speech, press, and assembly, expressly guaranteed by the first amendment, Burger asserted that the first amendment should be read to include the right to attend criminal trials to prevent these enumerated guarantees from losing much of their meaning.[60] Thus,

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[53]*Id.* at 564. Burger referred to his own concurring opinion in *Gannett* that emphasized the distinction between a pretrial suppression hearing and an actual trial. *Id.* The Chief Justice also noted that the *Gannett* decision had only considered the sixth amendment claim of the petitioner and did not decide whether the first amendment guaranteed a right of the public to attend trials. *Id.*

[54]*Id.* at 564-73. This is the same approach that Blackmun took in his dissent in *Gannett*. *See supra* note 43.

[55]448 U.S. at 569.

[56]More specifically, Chief Justice Burger found that the following reasons supported the practice of open criminal trials: (1) Open trials promoted confidence in the judicial system and fostered an appearance of fairness; (2) Open trials enhanced the quality of testimony, discouraged perjury, and provided the opportunity for someone in attendance at the trial who had knowledge of the relevant facts to furnish additional evidence or expose false testimony; (3) Open trials enhanced the performance of all those involved in criminal prosecutions and discouraged misconduct by the participants; (4) Open trials protected the judge from imputations of dishonesty and discouraged decisions based on partiality or secret bias; (5) Open trials had a significant community therapeutic value and served a prophylatic purpose of providing an outlet for the concerns, emotions, and hostilities of the community; finally, (6) Open trials served as a forum of legal education for the public, providing the public with an understanding of the legal system in general and the procedures and rules of law in a particular case, thereby increasing respect for the law. *Id.* at 569-73.

[57]*Id.* at 573.

[58]*Id.*

[59]*Id.* at 575.

[60]*Id.* at 575-80. The Chief Justice stated that these explicit first amendment "freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Id.* at 575. Burger found that the manner in which criminal trials are conducted is an aspect of government of the highest concern and importance to the public. *Id.* Thus, the first amendment guarantees "pro-

even though no explicit right to attend criminal trials can be found in the Constitution, the plurality concluded that the right to attend criminal trials "is implicit in the guarantees of the First Amendment; without the freedom to attend such trials . . . important aspects of freedom of speech and 'of the press could be eviscerated.' "[61]

Having concluded that the public's right to attend criminal trials was protected under the first amendment, Burger found the closure order challenged in *Richmond Newspapers* to be invalid.[62] The trial judge made no findings to support the order, did not inquire into alternative solutions to closure, and failed to recognize any constitutional right of the public and the press to attend the trial.[63] The standard that Burger devised to determine the validity of closure orders was "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[64] Under this standard, the challenged order in *Richmond Newspapers* was invalid.[65]

Justice Stevens' impression of the significance of the *Richmond Newspapers* decision can best be appreciated by the first sentence of his concurring opinion: "This is a watershed case."[66] In his view, the Court was recognizing for the first time a first amendment right of access to newsworthy information.[67]

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hibit the government from summarily closing courtroom doors," *id.* at 576, otherwise the first amendment freedoms would lose much of their meaning. There would not be much value in a free press that was prohibited from scrutinizing an important government function, such as criminal trials, that had traditionally been open.

[61]*Id.* at 580 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).

[62]448 U.S. at 581.

[63]The final criticism of the trial judge's conduct is interesting because *Richmond Newspapers* was the first case in which the Supreme Court recognized any constitutional right of the public and the press to attend criminal trials.

[64]448 U.S. at 581 (footnote omitted). Burger further found that the public's right to attend criminal trials was not absolute. He suggested that "a trial judge [may], in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." *Id.* at 581-82 n.18. However, the limits he discussed involved situations where there was a limited amount of seating in the courtroom or a risk that the trial would not be conducted in an orderly setting. *Id.*

[65]*Id.* at 581. In a brief concurring opinion, Justice White expressed his view that this case would not have been necessary if the Court, in *Gannett*, had "construed the Sixth Amendment to forbid excluding the public from criminal proceedings." *Id.* at 581-82 (White, J., concurring).

[66]*Id.* at 582 (Stevens, J., concurring).

[67]*Id.* at 583. Stevens suggested that this case represented an adoption, by a majority of the Court, of the dissenting opinions in Saxbe v. Washington Post Co., 417 U.S. 843, 850 (1974) (Powell, J., dissenting), and Houchins v. KQED, Inc., 438 U.S. 1, 19-40 (1974) (Stevens, J., dissenting). 448 U.S. at 582-83. In each of those cases a right of access to penal institutions was denied to the press. Stevens characterized the right of access in the public and the press as "rights of access to information about the operation of their government, including the Judicial Branch." *Id.* at 584. This view has broad implications in regard to civil cases, administrative hearings, legislative hearings, and juvenile proceedings.

In his separate concurring opinion, Justice Brennan derived an independent public right of access to criminal trials from the first amendment's structural role in our republican system of self-government.[68] Brennan found that "[i]mplicit in this structural role is not only 'the principle that debate on public issues should be uninhibited, robust, and wide-open,' but also the antecedent assumption that valuable public debate . . . must be informed."[69] In right of access cases, Brennan contended that the courts should first "consult historical and current practice with respect" to public access to the particular proceedings or information, and, second, should assess the specific importance of public access to the governmental process involved.[70] Applying this approach to public access to criminal trials, and to this case in particular, Justice Brennan found that the Virginia statute violated the first and fourteenth amendments.[71]

Justice Stewart wrote a brief concurring opinion in which he distinguished his opinion in *Gannett* as interpreting only the sixth amendment.[72] Stewart found that "the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal."[73] He stated that this right is not absolute, however, and therefore it may be restricted by such non-constitutional considerations as the preservation of trade secrets, and the protection of a youthful prosecution witness in a rape case, as long as the accused's sixth amendment right to a public trial was not impaired.[74]

Justice Blackmun's concurring opinion reiterated his sixth amendment position from his dissent in *Gannett*, but concluded as a secondary position that the first amendment must also provide some measure of protection for the public right of access to trials.[75] Blackmun expressed reservations, however, about the "veritable pot-

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[68]448 U.S. at 587 (Brennan, J., concurring).

[69]*Id.* at 587 (citation and footnote omitted) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[70]448 U.S. at 588-89 (Brennan, J., concurring).

[71]*Id.* at 589-98. Justice Brennan, as Chief Justice Burger had done, *id.* at 581-82 n.18, did not specifically address "[w]hat countervailing interests might be sufficiently compelling to reverse this presumption of openness." *Id.* at 598 (Brennan, J., concurring). Brennan did suggest, however, that national security may be such a compelling interest. *Id.* at 598 n.24.

[72]*Id.* at 598-99 (Stewart, J., concurring).

[73]*Id.* at 599 (footnote omitted).

[74]*Id.* at 600 n.5. Justice Stewart was foreshadowing the issues of Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).

[75]*Id.* at 603-04 (Blackmun, J., concurring). Blackmun found the Court's decision personally gratifying because the Court adopted his technique from *Gannett* of relying on legal history to determine the right of access to criminal trials, *id.* at 601; *see supra* note 43, and also because the opinion at least partially cleared up some of the confusion left by *Gannett*. *Id.* at 602-03 & nn.1-2; *see supra* note 42 and accompanying text.

pourri" of constitutional sources for the right of access that the various justices had advanced.[76] In Blackmun's view, "uncertainty mark[ed] the nature—and strictness—of the standard of closure the Court adopt[ed]."[77]

In both *Gannett* and *Richmond Newspapers*, the trial court had ordered closure presumably to protect the defendants' right to a fair trial; therefore, the Supreme Court was faced with the task of determining whether any constitutional protection existed for the public's interest in attending criminal trials and then balancing that right against the effect of a public trial on the defendant's right to a fair trial. *Globe Newspaper Co. v. Superior Court*[78] was the Court's first opportunity to balance the newly recognized public right of access against other state interests.[79] The case arose when reporters for the Boston Globe were denied access to a rape trial involving three minor victims. The trial judge had ordered the courtroom closed during the hearings on preliminary motions.[80] Before the actual trial began, the appellant, Globe Newspaper Company (Globe), moved that the court revoke the closure order. The court refused to accept Globe's motion and ordered the exclusion of the press and the public from the courtroom during the trial, based on Section 16A of Chapter 278 of the Massachusetts General Laws.[81]

Globe unsuccessfully sought injunctive relief through a petition

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[76]*Id.* at 603.

[77]*Id.* The lone dissenter in *Richmond Newspapers* was Justice Rehnquist who found nothing in the first or sixth amendment, or any other provision of the Constitution, that prohibits a state trial judge from closing a criminal trial to the public and the press when the parties consent. *Id.* at 605 (Rehnquist, J., dissenting).

[78]457 U.S. 596 (1982).

[79]The state's interests asserted in *Globe Newspaper* were "the protection of minor victims of sex crimes from [the] further trauma and embarrassment [of public testimony]; and the encouragement of such victims to come forward and testify in a truthful and credible manner." *Id.* at 607 (footnote omitted).

[80]*Id.* at 598 & n.2.

[81]*Id.* at 599. The relevant portion of the statute reads as follows:

> At the trial of a complaint or indictment for rape, incest, carnal abuse or other crime involving sex, where a minor under eighteen years of age is the person upon, with, or against whom the crime is alleged to have been committed . . . the presiding justice shall exclude the general public from the court room, admitting only such persons as may have a direct interest in the case.

MASS. GEN. LAWS ANN. ch. 278, § 16A (West 1981).

One interesting point that the Court failed to address was the fact that the defendant had objected to the exclusion order that closed the trial to the general public and the press. 457 U.S. at 599. Apparently the defendant never pursued the trial court's overruling of his objection because the trial resulted in his aquittal; however, an interesting question is raised when the public's first amendment together with the accused's sixth amendment rights to an open criminal trial are balanced against the state's interest in protecting minor victims.

filed with a single justice of the Supreme Judicial Court of Massachusetts,[82] and eventually appealed to the United States Supreme Court.[83] Justice Brennan wrote for the majority.[84] After finding that the case was not moot,[85] Justice Brennan emphasized that the "decision in *Richmond Newspapers* firmly established for the first time that the press and the general public have a constitutional right of access to criminal trials."[86] In attempting to give this constitutional right a consistent and principled interpretation, Justice Brennan asserted that any interference with the public's right of access to criminal trials will have to meet the rigid standards of strict scrutiny.[87] Thus, before

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[82]457 U.S. at 599-600.

[83]After the single justice of the Supreme Judicial Court of Massachusetts denied the newspaper's petition for injunctive relief, Globe attempted an appeal to the full court; however, before Globe could file this appeal, the rape trial ended in an acquittal for the defendant. *Id.* at 600. When the Supreme Judicial Court of Massachusetts finally issued its judgment on Globe's appeal, it held that the case was moot, because the criminal trial had already ended in acquittal. 362 Mass. 846, 401 N.E.2d 360, *vacated*, 449 U.S. 894 (1980). Recognizing that the issues were "'capable of repetition yet evading review,'" 362 Mass. at 847, 401 N.E.2d at 362 (quoting Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911)), the court set forth its view as to the proper interpretation of the statute. The court held that Section 16A mandated closure only during the testimony of minor victims. 362 Mass. 846, 401 N.E.2d 360. Globe then appealed to the United States Supreme Court which vacated the judgment and remanded the case for further consideration in light of *Richmond Newspapers*. 449 U.S. 894 (1980).

On remand, the Supreme Judicial Court of Massachusetts held that the statute, construed to mandate closure of a trial involving sexual assault on a minor victim during the testimony of the minor, was constitutional under the first amendment. 432 N.E.2d 773 (Mass. 1981), *rev'd*, 457 U.S. 596 (1982). The court discerned an exception to the tradition of openness in criminal trials in cases involving sexual assaults and also emphasized "genuine State interests" in the mandatory closure rule which "would be defeated if a case-by-case determination were used." 423 N.E.2d at 779. The court did not think "that *Richmond Newspapers* require[d] the invalidation of the requirement, given the statute's narrow scope in an area of traditional sensitivity to the needs of victims." *Id.* at 781.

[84]Justices Blackmun, White, Marshall, and Powell joined in Justice Brennan's opinion forming the "odd Quintuplet" Justice Rehnquist had referred to in *Gannett*. 443 U.S. at 406 n.2 (Rehnquist, J., concurring).

[85]457 U.S. at 603.

[86]*Id.*

[87]*Id.* at 606-07; *see also id.* at 607 n.17. The application of strict scrutiny to the first amendment right implies that Brennan considered the right of access to be a fundamental right. A key point in Justice Brennan's analysis of the right of access in *Globe Newspapers* was buried in a footnote. *See id.* at 605 n.13, This footnote implies that Brennan believed that, because the tradition of open criminal trials had been recognized as constitutionally protected and fundamental to our system of justice in *Richmond Newspapers*, the court should no longer look exclusively to history to ascertain the contours of the rights. Brennan's opinion implies that the court should now develop a reasoned exposition of this traditional value and adopt a functional approach in interpreting the right of access by letting the rationales underlying the right dictate its scope. Thus, Chief Justice Burger's criticism of the majority for ignoring the history of exclusion in cases involving sexual assaults missed the point. By extending

the state can deny access to the public to any segment of a criminal trial, "it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[88]

The state interests asserted by Massachusetts in support of the mandatory closure statute were "the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner."[89] Justice Brennan found that the first interest was a compelling one, but that Section 16A was not narrowly tailored to serve that interest.[90] In Justice Brennan's view, a case-by-case determination of whether closure was necessary to protect the welfare of a minor would serve this interest just as well as a *mandatory* closure rule.[91] The majority also rejected the state's second interest as a justification for Section 16A's interference with the public's constitutional right. Justice Brennan found that this was not a compelling interest and criticized Massachusetts for asserting this claim without empirical support.[92] Moreover, Brennan contended that this interest was speculative and "open to serious question as a matter of logic

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the right of access to all criminal trials, the Court was not contending that the right to attend trials involving sexual assaults has always existed, it was merely asserting that, given the long tradition of openness of criminal trials in general and the benefits that the public derives from the openness, there must be some principled basis for treating criminal trials involving sexual assaults differently from other criminal trials before the public's constitutional right of access can be restricted.

[88]*Id.* at 607.

[89]*Id.* (footnote omitted).

[90]*Id.* at 607-09.

[91]*Id.* at 609. Moreover, a case-by-case determination would ensure that the constitutional right of the press and general public would not be restricted except where necessary to protect the state's interest. Justice Brennan found support for the case-by-case approach to closure orders in Chief Justice Burger's plurality opinion in *Richmond Newspapers*: "Absent an overriding interest *articulated in findings*, the trial of a criminal case must be open to the public." *Id.* at 608 n.20 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980)).

Justice Brennan also contended that in order for a case-by-case approach to be meaningful, the press and the general public must be given an opportunity to express their objections to the closure order. 457 U.S. at 609 n.25. This suggests that a hearing will have to be held before the Court can constitutionally exclude the public and the press from a trial.

[92]457 U.S. at 609-10. It is not clear from the majority opinion in *Globe Newspapers* when the Court will require empirical data to support a request for closure. The Court found the first state interest — protecting child rape victims from the trauma of public testimony — to be sufficiently compelling and therefore found no need for empirical evidence. However, the Court apparently found that the second asserted state interest — encouraging minor victims to come forward and cooperate with the authorities — was not sufficiently compelling, and therefore indicated a need for empirical support. Thus, perhaps the requirement of empirical data to support a request for closure may

and common sense."[93] Thus, the Court held that, because the mandatory closure rule contained in Section 16A could not meet the standards of strict scrutiny, the statute violated the first amendment.[94] In his final footnote, Justice Brennan stated that the holding was a narrow one and emphasized that the mandatory nature of the statute, requiring no particularized determinations in individual cases, was the primary reason that Section 16A was unconstitutional.[95]

Justice O'Connor concurred in the judgement; however, in her brief separate opinion, she stressed that in her interpretation neither *Richmond Newspapers* nor *Globe Newspaper* carried any implications outside the context of criminal trials.[96]

Chief Justice Burger joined by Justice Rehnquist wrote a strong dissent. Burger began by noting a "disturbing paradox":[97] As a result of the Court's opinion in *Globe Newspaper*, a state could mandate the closure of all proceedings in order to protect a minor charged with rape; however, it could not require the closure of part of a criminal trial in order to protect a minor victim of a rape.[98] Burger saw the Court's decision as "a gross invasion of state authority and a state's duty to protect its citizens."[99] He criticized the Court for its "expansive interpretation of . . . *Richmond Newspapers, Inc. v. Virginia*, [and] its cavalier rejection of the serious interests supporting Massachusetts' mandatory closure rule."[100]

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only be necessary when the asserted state interest is not clearly compelling.

However, an alternative indication of when empirical support is necessary might depend on the interest asserted. Some interests are more conducive to demonstration by empirical data than others. Thus, if the interest is conducive to a demonstration by empirical data, the Court may require this demonstration before it would uphold an order restricting access to a criminal trial. Therefore, a criminal defendant who seeks a closure order may be required to demonstrate empirically that the increase in publicity from an open trial would jeopardize his constitutional right to a fair trial. Empirical data on the volume of media coverage concerning his arrest and trial should be sufficient to establish that his interest in closure is compelling; however, the trial court will have to make findings of fact and consider alternatives to closure to ensure that closure is narrowly tailored to serve the defendant's interest.

[93]*Id.* at 610.

[94]*Id.* at 610-11.

[95]*Id.* at 611 n.27. The opinion in *Globe Newspaper* suggests that a state statute that gave the trial court discretion to close a portion of a criminal trial to protect a minor rape victim from the trauma of public testimony would be constitutional, but only if the trial court first holds a hearing, makes findings that support the closure order, and considers alternatives to closure. Among the factors to be weighed in determining whether closure is necessitated "are the minor victim's age, psychological maturity and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives." *Id.* at 608.

[96]*Id.* at 611 (O'Connor, J., concurring).

[97]*Id.* at 612 (Burger, C.J., dissenting).

[98]*Id.*

[99]*Id.* at 613.

[100]*Id.* (citation omitted).

According to Burger, the Court incorrectly interpreted *Richmond Newspapers* as providing a first amendment right of access to all aspects of all criminal trials under all circumstances. The fundamental basis of the right of access to criminal trials, in Burger's view, was the historical tradition of openness.[101] The Chief Justice criticized the majority for ignoring the fact that there was no history of openness in cases involving sexual assaults, particularly those against minors.[102] Because of this lack of history of openness, Burger asserted that "*Richmond Newspapers* gives no support to the proposition that closure of the proceedings during the testimony of the minor victim violates the First Amendment."[103]

Burger also objected to the majority's use of strict scrutiny and contended that a lower level of scrutiny was appropriate. Because neither the purpose nor the effect of the Massachusetts statute was to primarily deny the public access to information, the Chief Justice thought the Court should merely inquire as to whether the restrictions were reasonable and then balance the limited effect on the public's first amendment rights[104] against the state's interest in protecting a child rape victim from the trauma of public testimony, which in many states would include television coverage.[105] Chief Justice Burger contended that the test developed in *Richmond Newspapers*[106] did not require the statute to "be precisely tailored so long as the state's interest overrides the law's impact on First Amendment rights and the restrictions imposed further that interest."[107] Thus, under this standard of review, Burger found that the Massachusetts statute was constitutional.[108]

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[101]*Id.* at 613-14. Chief Justice Burger cited to language in Justice Brennan's opinion in *Richmond Newspapers* as support for Burger's approach of consulting legal history in right of access cases. *Id. See supra* note 70 and accompanying text.

[102]For Justice Brennan's response to this criticism, see *supra* note 87.

[103]457 U.S. at 614 (Burger, C.J., dissenting) (footnote omitted).

[104]Chief Justice Burger described the effects on the public's access right as limited because the statute, as construed by the Supreme Judicial Court of Massachusetts, only denied access to the portion of the trial where the minor victim was testifying and a verbatim transcript of the testimony was available to the public to be used without limit. *Id.* at 615.

[105]*Id.* at 616-17. *Cf.* Chandler v. Florida, 449 U.S. 560 (1980) (states can provide radio, television, and still photographic coverage of a criminal trial, but are admonished to protect certain witnesses—children, victims of sex crimes, some informants, and the very timid—from the tensions of being televised).

[106]*See supra* text accompanying note 64.

[107]457 U.S. at 616 (Burger, C.J., dissenting). Chief Justice Burger emphasized that the mandatory rule was necessary to give assurances to minor rape victims that they would be protected from the trauma of public testimony. *Id.* at 618-19.

[108]*Id.* at 616. Justice Stevens also dissented, taking the position that, because the opinion of the Massachusetts Supreme Judicial Court was an advisory one, the Court should not have evoked the exception to the mootness doctrine. *Id.* at 620-23 (Stevens, J., dissenting).

The Court's most recent examination of the scope of the right of access, *Press-Enterprise Co. v. Superior Court*,[109] evolved from a trial judge's exclusion of the press and the public from the individual voir dire examinations in a trial for the rape and murder of a teenage girl.[110] The trial judge also refused to release a transcript of the voir dire proceedings, even after the trial had ended.[111] Chief Justice Burger delivered the opinion of the Court,[112] and began by reviewing the historical evidence on public jury selection.[113] After determining that "[p]ublic jury selection was the common practice in America when the Constitution was adopted,"[114] the Chief Justice examined the many benefits of open proceedings in today's criminal justice system[115] and

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[109]104 S. Ct. 819 (1984).

[110]*Id.* at 821. The state opposed Press-Enterprise's motion that the voir dire proceedings be open to the public, and the trial judge agreed, permitting the public to attend only the general, not the individual, voir dire examinations. *Id.* As a result of this order, only three days of a *six week* voir dire were open to the public. *Id.* The Court felt compelled to admonish the trial court for the length of the voir dire proceeding and asserted "that a *voir dire* process of such length, in and of itself undermines public confidence in the courts and the legal process." *Id.* at 824 n.9. *Contra id.* at 830-31 (Marshall, J., concurring).

[111]*Id.* at 821. Thus, the effect on the public's right to access in *Press-Enterprise* was greater than any of the three previous right of access cases. *Cf. Globe Newspaper*, 457 U.S. at 615 (Burger, C.J., dissenting) (state did not deny the public or the media access to the trial transcript); *Richmond Newspapers*, 448 U.S. at 562 n.3 (tapes of the closed trial were available to the public as soon as the trial terminated); *Gannett*, 443 U.S. at 376 n.4 (transcript of the closed suppression hearing made available to petitioner immediately after defendants plead guilty).

[112]This was a unanimous decision with Justices Brennan, White, Blackmun, Powell, Rehnquist, Stevens, and O'Connor all joining the opinion of the Court. Justices Blackmun and Stevens filed concurring opinions and Justice Marshall filed an opinion concurring in the judgment.

[113]104 S.Ct. at 822-23. This technique of examining the history of openness of the particular portion of a criminal proceeding at issue was rejected by the majority in *Globe Newspaper*, 457 U.S. at 596 n.13 (ignoring history of closed trial when minor sex victim testified). Chief Justice Burger's use of this technique in the context of voir dire proceedings may indicate that a majority of the Court favors such an examination when the public or the press attempt to extend the right of access beyond the context of criminal trials. Such an approach would reconcile the reasoning in these two decisions. *See* 104 S. Ct. 828 (Stevens, J., concurring). *But see infra* note 115. However, the applicability of the right of access to proceedings not historically open remains unclear.

[114]*Id.* at 823. It is worthy to note that one of the major reasons for examining the history of voir dire is to determine what the practice was at the time the Constitution was adopted. *See id.* at 829 n.8. This is the critical time period "because the Constitution carries the gloss of history." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). Another value in finding a tradition of openness is that such a finding "implies the favorable judgment of experience." *Id.*

[115]104 S. Ct. at 823-24. In listing these benefits. Chief Justice Burger referred to the benefits of open trials in general, rather than open voir dire proceedings in particular. This might imply that the majority considered voir dire to be a part of a criminal trial rather than a separate proceeding. *But see id.* at 828 (Stevens, J., con-

concluded that the guarantees of open proceedings in criminal trials apply to voir dire examinations of potential jurors.[116] The Court, thus, applied strict scrutiny to the trial court's interference with the constitutionally protected right of access.[117] The trial court asserted two interests in support of its actions: the right of the accused to a fair trial, and the privacy rights of certain prospective jurors who revealed sensitive information during the individual voir dire examinations.[118] The Court conceded that the first of these interests was compelling,[119] but rejected the trial court's conclusion that these interests were sufficient to warrant closure, because the trial court failed to make "findings showing that an open proceeding in fact threatened those interests."[120] Burger also criticized the trial court's failure to consider alternatives to closure and complete suppression of the transcript.[121] Thus, the Court found that the trial court's actions violated the first amendment right of access.[122]

In summary, the first amendment right of access developed as a result of the media's efforts to provide greater coverage of criminal

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curring) (suggesting that the Court's opinion was not based on a finding that voir dire is a part of a criminal trial). On the other hand, the Court's use of the benefits of open trials in general, in the context of the effect of openness on voir dire, may indicate that the Court found no principled reason for treating a voir dire proceeding any different than a criminal trial for purposes of the first amendment right of access, even though voir dire was not recognized as a part of the criminal trial itself.

[116] *Id.* at 824.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.* at 825 (footnote omitted). The Court went on to state that "it is not possible to conclude that closure was warranted" when the trial court fails to make such findings. *Id.* Thus, it appears that even if a state asserts a compelling interest in support of a closure order, such as the defendant's sixth amendment right to a fair trial, *see id.* at 823 ("No right ranks higher than the right of the accused to a fair trial"), the order will not be upheld, unless the issuing court made findings demonstrating that closure was necessary to protect the asserted interest.

[121] *Id.* at 825-26. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." *Id.* Thus, the consideration of alternatives to closure that would protect the state's interests is also a requirement for a closure order to be valid.

[122] Justice Blackmun wrote a brief concurring opinion to emphasize that in his interpretation the Court's opinion did not recognize a constitutional right of privacy for prospective jurors. *Id.* at 826-27 (Blackmun, J., concurring).

Justice Stevens also authored a brief concurring opinion in which he asserted that the Court's decision was not based on a finding that voir dire is a part of a criminal trial and in fact such a determination is not even necessary in evaluating first amendment right of access issues. *Id.* at 828 (Stevens, J., concurring). Stevens reiterated his view from his concurring opinion in *Richmond Newspapers*, 448 U.S. at 582-83 (Stevens, J., concurring), and his dissenting opinion in Houchins v. KQED, Inc., 438 U.S. 1, 30, 31-32 (Stevens, J., dissenting), that the first amendment right of access is not limited to a public right to attend criminal trial, but rather encompasses a right in the public to "access to information about the operation of their government." *Richmond Newspapers*, 448 U.S. at 584 (Stevens, J., concurring).

trials and the resulting conflicts with the criminal justice system. The Supreme Court has recognized that the press and the general public have a constitutionally protected right to attend criminal trials that can only be restricted by a compelling state interest which meets the standards of strict scrutiny. Due to the increase of unlawful conduct by juveniles,[123] one area of future conflict between the press and the judicial system is likely to involve access to juvenile delinquency hearings.[124] In contrast to the first amendment's mandate of openness in adult criminal trials, no clear constitutional guidelines exist with respect to the right of the public and the press to attend juvenile court hearings. The remainder of this Note will examine the issue of whether the right of access should be extended to include juvenile court proceedings, and the effect on juvenile court procedures and state statutes if such an extension is recognized.

III. The Right of Access versus Juvenile Court Confidentiality

A. Background on Juvenile Court Confidentiality

The question of whether the public's right of access should be extended to hearings in juvenile courts raises difficult and complex policy and constitutional issues.[125] An examination of the background of juvenile court confidentiality will prove helpful in resolving these issues. This discussion will analyze both the theories underlying the

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Justice Marshall concurred in the judgment of the Court but wrote separately to emphasize that he would require trial courts to demonstrate that "the [closure] order in question constitutes *the least restrictive means available* for protecting compelling state interests." 104 S. Ct. at 830 (Marshall, J., concurring).

[123]*See supra* sources cited at note 13.

[124]As was previously noted, *see supra* note 7, this Note recognizes that juvenile courts handle many types of cases besides delinquency cases; however, the discussion herein relates only to cases where juveniles have committed acts that if committed by an adult would be crimes. Additionally, this Note makes no effort to distinguish between adjudicatory and disposition hearings in juvenile court for the purpose of the right of access.

[125]Right of access issues can arise in two ways in juvenile proceedings: the juvenile respondent can request that the public and press be admitted or the public or press could request access over the juvenile's objections. In the first type of right of access case, the Court focuses on the juvenile's interests in publicity, similar to the adult defendant's sixth amendment right to a public trial. *See* R.L.R. v. State, 487 P.2d 27 (Alaska 1971) (concluding that juveniles have a right to a public trial). In the second type of case, the Court focuses on the public's interest in attending the proceeding. This Note deals only with the latter type of case.

For a discussion of issues on whether a juvenile should be accorded the right to public trial see, McKeiver v. Pennsylvania, 403 U.S. 528, 553-56 (1971) (Brennan, J., concurring and dissenting); I.J.A./A.B.A. Juvenile Justice Standards Project, Standards Relating to Adjudication, Standards 6.1-6.3, at 70-76 (1980); McLaughlin & Whisenard, *Jury Trial, Public Trial and Free Press in Juvenile Proceedings: An Analysis and Comparison of IJA/ABA, Task Force and NAC Standards*, 46 Brooklyn L. Rev. 1 (1979).

juvenile justice system and the reality of how the system has achieved its dual goals of preventing juvenile crime and rehabilitating juvenile offenders.

1. History and Philosophy of the Juvenile Court System.—The current juvenile court system is based on the concept of parens patriae[126] and developed in response to the problems of accelerated industrialization, mass immigration, and rapid urbanization of the nineteenth century.[127] The social problems created by the phenomenon of the Industrial Revolution led to reform movements in the treatment of children.[128] In addition, throughout the nineteenth century, as the social sciences developed and became more prominent, an awareness of the special problems of juveniles emerged and with it an optimism that juveniles could be rehabilitated.[129] Thus, the juvenile court was founded on a philosophy of treatment and rehabilitation.

The passage of the Juvenile Court Act[130] by the Illinois legislature in April, 1899 is generally regarded as the most significant event of the juvenile reform movement.[131] The Act created the first statewide court especially for children and contained most of the distinctive features of the current juvenile court, including confidential records, private hearings, and procedural informality.[132] The concept spread rapidly to other states and by 1925 all but two states had juvenile courts.[133]

Prior to the development of a separate juvenile court system, juveniles were treated as adults for the purposes of the criminal laws.[134] The new juvenile statutes brought with them a new vocabulary,[135] new types of courtrooms,[136] new procedures,[137] new

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[126]TASK FORCE, *supra* note 13, at 2. The discussion of the development, philosophy, and assessment of the juvenile court system relies heavily on this source. For other sources that provide a history and development of the modern juvenile justice system, see Fox, *Juvenile Justice Reform: An Historical Prospective*, 22 STAN. L. REV. 1187 (1970); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909) (classic summary of the early juvenile court proponents' thoughts on the goals of the system).

[127]*See* TASK FORCE, *supra* note 13, at 2-3.

[128]*Id.* at 2.

[129]Jonas, *supra* note 8, at 288; TASK FORCE, *supra* note 13, at 2-3.

[130]Act of Apr. 21, 1899, 1899 Ill. Laws 131.

[131]*See* Jonas, *supra* note 8, at 290-92; TASK FORCE, *supra* note 13, at 3.

[132]Jonas, *supra* note 8, at 290; TASK FORCE, *supra* note 13, at 3.

[133]TASK FORCE, *supra* note 13, at 3.

[134]*See generally In re* Gault, 387 U.S. 1, 15 (1967); TASK FORCE, *supra* note 13, at 2-3.

[135]TASK FORCE, *supra* note 13, at 3 ("Petition instead of complaint, summons instead of warrant, initial hearing instead of arraignment,. . . disposition instead of sentence."). For a more detailed comparison of the vocabulary of juvenile and criminal trials, see L. SIEGEL & J. SENNA, *supra* note 13, at 281.

[136]TASK FORCE, *supra* note 13, at 3 ("The physical surroundings . . . should seem less imposing than a courtroom, with the judge at a desk or table instead of behind a bench, fatherly and sympathetic while still authoritative and sobering.").

[137]*Id.* at 3. The juvenile statutes stressed procedural informality.

goals,[138] and even a new type of judge.[139] Juvenile courts differed from adult criminal courts in a number of basic respects, reflecting the philosophy that erring children should be protected and rehabilitated rather than punished.[140] Thus, the original juvenile courts stressed informal procedures rather than adversary tactics; therefore, lawyers were unnecessary.[141] The emphasis was on the juvenile respondent's background instead of the facts of a given incident, and the court relied on the social services to diagnose and treat the juvenile.[142] The courts believed that it was in the best interests of the child to substitute flexible judicial handling for the due process protections of adult criminal trials.[143] In order to justify these procedural informalities against constitutional attacks, the juvenile courts characterized their proceedings as fundamentally noncriminal.[144]

In accordance with their emphasis on protecting and helping juveniles and to promote an informal atmosphere, the reformers advocated confidential records and hearings. Protecting confidentiality in the juvenile process was believed to be essential to rehabilitation.[145] Therefore, the reformers advocated placing restrictions upon the public's access to juvenile hearings and to juvenile records.[146]

2. Subsequent Developments in the Juvenile Court System.— Traditionally the juvenile courts treated juvenile offenders with leniency and tolerance instead of processing them through a system that resembled the adult criminal justice system. However, in recent years, the constitutional framework within which the juvenile courts function has been redefined.[147] The Supreme Court has set aside procedural informality by introducing due process protections into juvenile court proceedings.[148] The constitutional doctrine of fundamental fairness, derived from the due process clause of the fourteenth amendment, requires that juvenile proceedings become more like adult criminal trials.[149]

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[138]*Id.* The goal of the reformers was to rehabilitate rather than punish. For a discussion of the goals of the modern juvenile system, see L. SIEGEL & J. SENNA, *supra* note 13, at 284-88.

[139]TASK FORCE, *supra* note 13, at 3 ("Even the judicial role began to attract extralegal specialists, men and women aware of and interested in the social and scientific development of the day . . . ."). For a discussion of the role of the juvenile court judge in the modern juvenile court, see L. SIEGEL & J. SENNA, *supra* note 13, at 394-95.

[140]*See* TASK FORCE, *supra* note 13, at 3. *See also* L. SIEGEL & J. SENNA, *supra* note 13, at 280-84 (discussing distinctions between both the early and the modern juvenile court system and the adult criminal system).

[141]TASK FORCE, *supra* note 13, at 3.

[142]*Id.*

[143]Jonas, *supra* note 8, at 292-93.

[144]*Id.* at 293.

[145]*Id.* at 294-97.

[146]*Id.*

[147]*See generally* L. SIEGEL & J. SENNA, *supra* note 13, at 321-44.

[148]*See In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966).

[149]*See* Breed v. Jones, 421 U.S. 519, 541 (1975) (recognizing due process guarantees

The Supreme Court has formalized juvenile proceedings through five major decisions over the last two decades. The first of these cases was *Kent v. United States*,[150] decided in 1966. In *Kent*, the juvenile court had transferred jurisdiction of the juvenile respondent's case to an adult criminal court without a hearing or findings to support the transfer.[151] The Supreme Court overturned the transfer on both statutory and due process grounds,[152] holding that the juvenile had a right to a hearing, access to social service records, and a statement of the reasons supporting a decision to transfer jurisdiction to the adult court.[153] The Court did not specifically address the question of due process protections in a juvenile delinquency hearing; however, the decision did emphasize "that the [transfer] hearing must measure up to the essentials of due process and fair treatment."[154]

The most significant constitutional case in formalizing the juvenile court's activities was handed down the following year. In *In re Gault*,[155] the Court held that juvenile adjudicatory hearings must provide certain due process protections where the juvenile could be committed to a state institution.[156] These due process requirements include the right to notice of charges in advance of the hearing, the right to counsel, the right to cross-examine and to confront witnesses, and the privilege against self-incrimination.[157] The *Gault* decision was significant not only because of the procedural reforms it initiated, but because of its far-reaching impact throughout the entire juvenile justice system. In *Gault*, the Court reviewed the inadequacies of the

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juveniles the right to protection against double jeopardy); *In re* Winship, 397 U.S 358, 368 (1970) (recognizing due process guarantees juveniles the right to a standard of proof beyond a reasonable doubt); *In re* Gault, 387 U.S. 1, 30 (1967) (recognizing due process guarantees juveniles the right to notice of charges, the right to counsel, the right to confront and cross-examine witnesses, and the right against self-incrimination).

[150]383 U.S. 541 (1966).

[151]Kent was under probation for housebreaking when he was arrested for housebreaking, robbery, and rape. After the juvenile court waived its jurisdiction over the sixteen-year-old, Kent was indicted by the grand jury and was subsequently found guilty of housebreaking and robbery and not guilty by reason of insanity on the charge of rape. Kent was sentenced to serve a period of 30 to 90 years. *Id.* at 550.

[152]*Id.* at 553.

[153]*Id.* at 561-63.

[154]*Id.* at 562, *cited in In re* Gault, 387 U.S. 1, 12, 30 (1967).

[155]387 U.S. 1 (1967).

[156]*Id.* at 30-31. *In re Gault* arose from a juvenile court's order that a 15-year-old boy be committed to a state industrial school for six years. The juvenile had been on probation for being in the company of another boy who stole a wallet when he was taken into custody for making obscene telephone calls. *Id.* at 7. After an informal hearing, the juvenile court judge committed the juvenile to the state industrial school until he reached majority. *Id.* The Supreme Court noted that if Gault had been an adult, the maximum penalty would have been a fine of $5 to $50 or imprisonment for not more than two months. *Id.* at 8-9, 29.

[157]*Id.* at 31-57.

traditional juvenile court procedures and noted that the early ideals had not been met and that the system needed to be reformed.[158]

In *In re Winship*,[159] the Court rejected the idea that the juvenile justice system was a civil system and held that a juvenile in a delinquency adjudication must be proven guilty beyond a reasonable doubt.[160] The Court observed that "[t]he same considerations that demand extreme caution in fact-finding to protect the innocent adult apply as well to the innocent child."[161] The state's argument that "afford[ing] juveniles the protection of proof beyond a reasonable doubt would risk destruction of beneficial aspects of the juvenile process"[162] was rejected by the Court. Thus, the Court concluded that extending this protection to juveniles "'will not compel the States to abandon or displace any of the substantive benefits of the juvenile process.'"[163]

The decision in *McKeiver v. Pennsylvania*[164] demonstrated that the Court was unwilling to extend all the constitutional protections of an adult criminal trial to juvenile hearings. In *McKeiver*, the Court decided that the sixth amendment right to a jury trial is not among the constitutional safeguards that the due process clause requires at delinquency adjudication hearings.[165] In so holding, the Court retreated to the traditional criminal-noncriminal distinction by declaring that juvenile proceedings are not criminal prosecutions under the sixth amendment.[166] The majority found that a jury trial is not necessary for accurate fact-finding and would not remedy the problems associated with the lack of rehabilitation in the juvenile court.[167] Moreover, the Court feared that if the right to a jury trial were imposed on the juvenile court, it would bring the delays, formality, and "clamor of the adversary system" to the juvenile court.[168] The Court also suggested that extending the right to a jury trial to juveniles might bring the public trial to the juvenile system, a consequence that the plurality apparently opposed.[169] Thus, the Court believed that granting the juvenile offender the right to a jury trial would hinder rather than advance the juvenile justice system.

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[158]*Id.* at 17-31.

[159]397 U.S. 358 (1970).

[160]*Id.* at 368.

[161]*Id.* at 365.

[162]*Id.* at 366.

[163]*Id.* at 367 (quoting *In re* Gault, 387 U.S. at 21).

[164]403 U.S. 528 (1971).

[165]*Id.* at 545.

[166]*Id.* at 541.

[167]*Id.* at 547.

[168]*Id.* at 550.

[169]*Id. But see id.* at 553-56 (Brennan, J., concurring and dissenting). Justice Brennan concurred in the judgment in *McKeiver* that the right to a jury trial need not be extended to juvenile proceedings in which the press and the public were admitted; however, in the consolidated case of *In re* Burris, 403 U.S. 528 (1971), Justice Brennan

Since the *McKeiver* decision, the Supreme Court has heard only one case involving an extension of some aspect of the criminal justice system to juvenile proceedings. In *Breed v. Jones*,[170] the Court held that the prosecution of the juvenile respondent in an adult criminal court, after an adjudicatory proceeding in juvenile court, violated the double jeopardy clause of the fifth amendment.[171] The Court again recognized that "a gap [existed] between the original benign conception of the [juvenile court] and its realities."[172] The Court further observed that with the exception of the *McKeiver* case, its response to this perception has been to treat juvenile proceedings and criminal prosecutions alike in regard to the applicability of due process guarantees.[173]

Studies conducted by various groups support the Court's observations in *Kent*, *Gault*, *Winship*, and *Breed* that the rehabilitative goals and ideals of the juvenile reform movement of the nineteenth century have not been met.[174] The modern juvenile court system has not succeeded in rehabilitating delinquent minors or in reducing juvenile crime.[175] The community's unwillingness to provide the necessary resources is often cited as one reason for the failures;[176] however, there may be an even more basic reason. One study has concluded that the failure of the juvenile system to fulfill its goals stems from the overly optimistic views of the reformers who created the system.[177] Thus far methods for rehabilitating juveniles that also prevent juvenile crime have not been successfully developed.[178]

This limitation on the system's ability to meet its dual goals of rehabilitating juvenile offenders and preventing juvenile criminality, combined with public anxiety over the increase in the numbers of juveniles committing serious crimes, has produced a schism between

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dissented on the same issue because under the juvenile procedures in that case the press and the public were excluded. Brennan felt that allowing accused juveniles to bring the community's attention to bear upon their hearings protected the interests that the sixth amendment right to a jury trial was intended to protect. *Id.* at 555 (Brennan, J., concurring and dissenting).

[170]421 U.S. 519 (1975).

[171]*Id.* at 541.

[172]*Id.* at 528.

[173]*Id.* at 528-29. The *Breed* decision sought to balance the juvenile's interest in procedural protections and the rehabilitative goals of the juvenile justice system. *Id.* at 535-41.

[174]*See generally* TASK FORCE, *supra* note 13, at 7 and sources cited therein.

[175]*Id.*, *cited in McKeiver*, 403 U.S. at 544.

[176]TASK FORCE, *supra* note 13, at 7-8, *cited in McKeiver*, 403 U.S. at 544.

[177]TASK FORCE, *supra* note 13, at 8.

[178]*Id.* The Task Force noted that "[e]xperts in the field agree that it is extremely difficult to develop successful methods for preventing serious delinquent acts through rehabilitative programs for the child." *Id.*

the theory and practice of the juvenile court.[179] The juvenile court statutes still generally reflect the philosophy of treatment and rehabilitation, but in practice, the juvenile court finds itself operating more like an adult criminal court with the associated characteristics of punishment and deterrence.[180] The Supreme Court recognized this and felt compelled to extend most of the due process protections of the adult criminal trial to juvenile proceedings.[181] However, juvenile court laws and procedures still remain which affect the public's right of access to those proceedings and can only be rationalized on the basis of the system's original theories of treatment and rehabilitation. If attempts at rehabilitation are futile, it no longer makes sense to argue that practices such as juvenile court confidentiality should be maintained to promote rehabilitation. Therefore, the following section will analyze the benefits to the public of open juvenile proceedings and balance these benefits against the state's interests in closure.

B. Extending the Right of Access to Juvenile Hearings

Even though the right of access to criminal trials has been narrowly construed, it still has implications for public access to juvenile delinquency hearings because the benefits of public scrutiny that the right is based on are equally applicable to juvenile proceedings. The Court's approach in right of access cases has been to first review the historical evidence on public access to the particular proceeding and then assess the specific importance of public access to the governmental process involved.[182] Therefore, in evaluating a first amendment challenge to a state statute or a particular juvenile court closure order, the Court would consult the historical and current practices of the juvenile courts with respect to public access and assess the specific importance of public access to the functioning of the juvenile courts.

In reviewing the history of public access to juvenile proceedings the Court would find that juvenile proceedings have traditionally been closed to provide confidentiality which was thought to be essential to rehabilitation.[183] An interesting aspect of the historical review of juvenile court proceedings is that it only dates back to 1899,[184] prior to that time juveniles were treated like adults for purposes of the

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[179]*Id.*

[180]*Id. See infra* note 197 and accompanying text.

[181]*See supra* note 149.

[182]*See* Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 822-24 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603-06 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-80 (1980); *id.* at 589-97 (Brennan, J., concurring).

[183]*See supra* notes 145-46 and accompanying text.

[184]*See supra* notes 130-33 and accompanying text.

criminal law.[185] In the historical examinations of open criminal trials and voir dire proceedings, the Court focused on the period before the Constitution was adopted to determine what the practice was at the time the Constitution was enacted.[186] This pre-Constitution examination would be futile in evaluating the history of juvenile court practices; therefore, a review of the historical evidence may be of little value in resolving this issue.

The applicability of the first amendment right of access to proceedings not historically open remains unclear, but in the context of juvenile hearings the Court could also consult the current practices of the juvenile courts for guidance on this issue. Presently many state statutes provide for the exclusion of the general public, but allow for the presence of interested persons at the judge's discretion.[187] Other jurisdictions have adopted a conditional access approach under which those permitted by the court to attend the juvenile proceeding may not reveal the identity of the juvenile offender.[188] Because of these various approaches, juvenile hearings today cannot truly be described as closed to the public.[189] In fact, an examination of the current practice may reveal a tradition of access with limits on publishing the identity of the juvenile respondent.

Because the history of juvenile hearings only dates back to 1899 and because of the various approaches to public access among the states, a review of the historical and current practices of juvenile courts in this area will probably not be determinative in resolving a case of first impression on whether the first amendment right of access should be extended to juvenile hearings. Therefore, the Court will have to resolve the case by examining the importance of public access to the juvenile justice system. In developing the public right of access to criminal trials, the Supreme Court has emphasized that open judicial proceedings "[play] an important role in the administration of justice today."[190] Public scrutiny "enhances the quality and safeguards the integrity of the fact-finding process."[191] Public access also "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the

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[185]*See supra* note 134 and accompanying text.

[186]*See* Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 822-23 (1984) (history of voir dire); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-69 (1980) (history of open criminal trials).

[187]*See, e.g.*, GA. CODE ANN. § 15-11-28(c) (1982); HAWAII REV. STAT. § 571-41 (Supp. 1982).

[188]*See, e.g.*, ALA. CODE § 12-15-65 (1975); D.C. CODE ANN. § 16-2316(d) (1981). *See generally* Comment, *Delinquency Hearings and the First Amendment: Reassessing Juvenile Court Confidentiality Upon the Demise of "Confidential Access,"* 13 U.C.D. L. REV. 123 (1979).

[189]*See In re* Gault, 387 U.S. 1, 24 (1967) ("This claim of secrecy, however, is more rhetoric than reality.").

[190]Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 823 (1984).

[191]Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

system."[192] Open trials "[permit] the public to participate in and serve as a check upon the judicial process,"[193] thereby discouraging decisions based on partiality or secret bias.[194] Moreover, public trials serve as a form of legal education for the public, providing an understanding of the legal system in general and the procedures and rules of law in a particular case.[195] Finally, open trials provide an outlet for community concern over crime and increase respect for the law and the judicial process.[196]

All of these benefits of public scrutiny in criminal trials are equally applicable to juvenile hearings. In many ways a juvenile delinquency hearing is similar to a criminal prosecution.[197] The juvenile court is a court of law, charged, like other agencies of the criminal justice system, with protecting the community against threatening conduct. Because of the increase in juvenile criminality and the failure to fulfill its rehabilitative goal, the modern juvenile court operates more like an adult criminal court focusing on punishment and deterrence. In response to this change in the practices of juvenile courts, the Supreme Court set aside flexible judicial handling by introducing due process protections into juvenile court proceedings.[198] Thus, in most respects the modern juvenile court more closely resembles an adult criminal court than the ideal envisioned by its founders.[199]

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[192]Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 823 (1984). *Cf.* E. SCHUR, RADICAL NONINTERVENTION 161 (1973) (arguing that formality in juvenile court procedures would actually make juvenile offenders feel they have been treated justly).

[193]Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982).

[194]Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980).

[195]*Id.* at 572-73.

[196]Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 823-24 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-72 (1982).

[197]*See In re* Gault, 387 U.S. 1, 28-29 (1967) ("[T]he points to which the [juvenile] judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute." (footnote omitted)).

[198]*See supra* note 147-73 and accompanying text.

[199]*See supra* notes 179-81 and accompanying text. As was previously noted, *see supra* text accompanying note 144, juvenile courts have characterized their proceedings as noncriminal. Some state statutes even specifically refer to juvenile hearings as civil cases. *See, e.g.*, MISS. CODE ANN. § 43-21-203(5) (1981). One approach that the courts could take in extending the right of access to juvenile proceedings would be to first recognize a public right of access to civil trials, and then, adhering to the "civil label of convenience" that has been attached to juvenile proceedings, include these proceedings within the extended scope of that right. In both *Richmond Newspapers* and *Gannett*, the Court noted that historically both civil and criminal trials have traditionally been open to the public. *Richmond Newspapers*, 448 U.S. at 580 n.17; *Gannett*, 443 U.S. at 386 n.15. In his concurring opinion in *Richmond Newspapers*, Justice Stewart explicitly stated that the public's right of access to criminal *and civil* trials was constitutionally protected. Moreover, a recent fifth circuit case has extended the public's right of access to civil proceedings relating to the release or incarceration of prisoners or to the conditions of their confinement. Newman v. Graddick, 696 F.2d 796 (5th Cir. 1983). Thus, the courts might extend the right of access to juvenile proceedings by first extending the public's right of access to include civil trials.

Moreover, the actions of the juvenile court significantly affect the public; therefore, the public has a vital interest in the workings of juvenile courts. Juvenile courts are entrusted with the responsibility of administering justice in cases involving the youth of society and, thus, are properly the subject of special public concern. Open juvenile hearings would increase the public's awareness of the need for adequate support services and resources. In addition, juvenile courts need to be held accountable to the public for the failure to fulfill their goal of preventing juvenile crime. Public scrutiny would promote a more conscientious performance by juvenile court judges and their staffs. Therefore, the first amendment right of access should be extended to juvenile delinquency hearings.

The main policy argument against extending the public right of access to juvenile hearings is that public access will create publicity and publicity is considered detrimental to rehabilitation.[200] Publicity is said to give the juvenile respondent a self-image of criminality and to stigmatize him, thus causing him to commit more delinquent acts.[201] In addition, adverse publicity may create future disabilities for a juvenile by limiting employment and educational opportunities.[202] The philosophy of the juvenile court is based on treatment and rehabilitation, exposure to adverse publicity is seen as a form of punishment. Moreover, advocates of closed proceedings claim that it is cruel and counterproductive to punish the parents of delinquents by publishing the child's misbehavior. Finally, it is alleged that some delinquents want attention and recognition; therefore, publicity may reward or contribute to delinquent behavior.[203]

The first flaw in these arguments is that rehabilitation is no longer the sole goal of the juvenile court, an equally compelling goal is protecting the public and preventing juvenile crime, which may be furthered by the deterrent effect that publicity would have. Moreover, proponents of the traditional arguments in favor of confidentiality often fail to recognize that confidentiality and rehabilitation are only impaired by the publication of the identity of the juvenile respondent, not by mere access alone. Juvenile court confidentiality involves two concepts, access and publication.[204] Only the latter directly affects

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[200]*See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 104 (1979); *see generally* Note, *Rights and Rehabilitation in the Juvenile Courts*, 67 COLUM. L. REV. 281, 286 (1967) (alleging that any relaxation on the curb of publicity betrays the philosophy of the juvenile court system).

[201]*See* Jonas, *supra* note 8, at 296; Comment, *supra* note 8, at 153.

[202]*See* Jonas, *supra* note 8, at 296; Comment, *supra* note 8, at 156.

[203]*See* Jonas, *supra* note 8, at 297; Comment, *supra* note 8, at 155.

[204]To shield juvenile offenders from the adverse effects of publicity, juvenile courts can exclude the press from the courtroom, thereby limiting the press' access, or the juvenile court could prohibit the publication of any information concerning juvenile

rehabilitation. Access may detract from the informal atmosphere of the proceedings, but the Supreme Court's introduction of due process safeguards has already significantly formalized juvenile court hearings. Thus, access along does not affect rehabilitation.

Moreover, the Supreme Court's decisions in *Oklahoma Publishing Co. v. District Court*[205] and *Smith v. Daily Mail Publishing Co.*[206] have resolved the conflict between the press's first amendment right to publish and the state's interests in protecting the identity of juvenile offenders in favor of the public's right to know the juvenile offender's name.[207] These cases affirmed the right of reporters to publish the lawfully obtained identity of juvenile offenders, whether such identity was obtained inside or outside of the juvenile courtroom.[208] Therefore, excluding the press and the general public from juvenile court hearings is likely to be ineffective in protecting the identity of juveniles who have committed serious acts of delinquency because the press is likely to learn of the juvenile respondent's identity through lawful means, such as interviewing witnesses at the scene of the incident.[209]

Because efforts at rehabilitation have proved to be futile, maintaining closed juvenile proceedings to promote rehabilitation can no longer be justified. Moreover, the efforts to achieve confidentiality

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proceedings, thereby limiting the press' ability to publish information. The major focus of this Note is on the concept of access. An in depth discussion of juvenile court efforts to limit publication is beyond the scope of this Note, but the issue is briefly considered *See infra* notes 205-09 and accompanying text.

[205]430 U.S. 308 (1977) (per curiam).

[206]443 U.S. 97 (1979).

[207]In *Oklahoma Publishing*, the Court held that a juvenile court could not use an injunction to prohibit the press from publishing the identity of a juvenile offender if such information was released while the press was in the courtroom. 430 U.S. at 311-12. In *Smith v. Daily Mail Publishing Co.*, the Court held that a state statute which made it a crime for a newspaper to publish the name of a juvenile respondent, even where such name was lawfully obtained by monitoring police band radio frequencies and interviewing witnesses, was unconstitutional. 443 U.S. at 106.

[208]*Smith v. Daily Mail Publishing Co.* was the Court's first opportunity to address the issue of whether a state can punish the publication of information lawfully obtained by the press outside of the courtroom and prior to the court's involvement in the case.

[209]*See, e.g.*, Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979). Some state courts that have addressed the issue of the press' right to attend juvenile proceedings have recognized the public's interests involved and the need for media access. Brian W. v. Superior Court, 20 Cal. 3d 618, 623, 574 P.2d 788, 791, 143 Cal. Rptr. 717, 719-20 (1978) (urging juvenile courts to "*actively encourage greater participation by the press*"); *In re* Jones, 46 Ill.2d 506, 509, 263 N.E.2d 863, 864-65 (1970) (stating the need for media access in rejecting minor's claim of a constitutionally protected right to a private hearing); *In re* R.L.K., 269 N.W.2d 367, 370 (Minn. 1978) (holding that the news media have a direct interest in attending juvenile proceedings, as required by statute); *In re* L., 24 Or. App. 257, 260 n.1 (1976) (recognizing the value of press access in focusing public attention on the failures and financial needs of the juvenile justice system).

by closing juvenile hearings may no longer be successful after *Smith v. Daily Mail Publishing Co.* Therefore, because the benefits to the public of open juvenile hearings outweigh the interests in restricting access to such hearings, the constitutionally protected right of access should be extended to include juvenile delinquency hearings.

IV. The Impact of Extending the Right of Access to Juvenile Hearings

A. Strict Scrutiny of Closed Juvenile Proceedings

The significance that the Court has attached to the first amendment right of access was demonstrated by its application of strict scrutiny to any restrictions on the public's access to criminal trials and voir dire proceedings.[210] The application of strict scrutiny implies that the Court considers this right to be fundamental. Therefore, if this constitutional protection were extended to juvenile proceedings, any interference with the public's access to these proceedings would also have to meet the standards of strict scrutiny. Thus, the current procedures used by juvenile courts would have to be altered to accommodate this new constitutional right.

Juvenile proceedings would be presumptively open if the right to access were extended to include such proceedings. Thus, in order for a juvenile court judge to exclude the press and the general public from a juvenile hearing, she would first have to hold a separate hearing and determine that a compelling interest exists that overrides the presumption of openness. The juvenile court judge would also have to articulate specific findings that closure was essential to protect the overriding interest, that closure was narrowly tailored to serve this interest, and that alternatives to closure were considered. Only after this procedure was completed could a juvenile court judge close her courtroom to the public and the press.

The interest traditionally advanced in favor of closed juvenile hearings is rehabilitation of the juvenile respondent. It is often asserted that confidentiality is essential to rehabilitation because of the possible adverse effects of publicity that might follow from an open proceeding. At the hearing on the closure issue, the juvenile court judge will first have to determine whether rehabilitation is a compelling interest. In *Davis v. Alaska*,[211] the state's contention that rehabilitation of a juvenile offender constituted a compelling interest was not challenged by the Court;[212] however, the Court concluded that the state

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[210]Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819, 824-26 (1984) (voir dire); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-10 (1982).

[211]415 U.S. 308 (1974).

[212]*Id.* at 319.

interest must be subordinated to a defendant's sixth amendment right of confrontation.[213] Similarly, in *Smith v. Daily Mail Publishing Co.*,[214] the asserted state interest in protecting the anonymity of juvenile offenders did not prevail against the first amendment rights of the press to publish lawfully obtained information.[215] Thus, rehabilitation will not always be a compelling interest, the finding may depend on the facts of the particular case, e.g., a juvenile offender with a dozen previous appearances may be beyond rehabilitation, while a first time offender, who did not commit a serious act of delinquency, might deserve every opportunity for rehabilitation.

If the juvenile court determines that rehabilitation is a compelling interest in a particular case, the court must then decide whether closure is essential to protect rehabilitation and narrowly tailored to serve that interest. On these issues the court might require empirical data to support the claim that the confidentiality derived from closed proceedings promotes rehabilitation. This evidence may be difficult to produce given the disappointing performance of the juvenile system thus far. Moreover, barring the public and the press from the courtroom may not ensure confidentiality. In *In re Gault*,[216] the Court noted that often the "claim of secrecy . . . is more rhetoric than reality."[217] The juvenile court must determine these issues on the facts of the case. Closed proceedings may be futile if there was extensive preadjudication publicity on the act of delinquency in which the identity of the juvenile was revealed.

Finally, the juvenile court must also consider alternatives to closure. This determination is closely related to the issue of whether closure is narrowly tailored to serve rehabilitation. If the only adverse effect of open proceedings is the possibility that the juvenile's identity will be revealed, which would impair his rehabilitation, the court might be able to open the proceeding, but conceal the juvenile respondent's identity from the members of the public and press who attend.[218] This would be a less restrictive alternative that would still provide the benefits of public scrutiny. If the juvenile court's ability to conceal the respondent's identity is in doubt, however, closure may be the preferred procedure to protect the interest of rehabilitation. Even if closure is found to be appropriate in a particular case, the juvenile court may still be required to provide the public and the press with a transcript of the proceedings with all the references to the child's identity deleted.

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[213] *Id.* at 319-20.

[214] 443 U.S. 97 (1979).

[215] *Id.* at 104-05.

[216] 387 U.S. 1 (1967).

[217] *Id.* at 24.

[218] *But see* Note, *The Press and Juvenile Delinquency Hearings: A Contextual Analysis of the Unrefined First Amendment Rights of Access*, 39 U. PITT. L. REV. 121, 127 (1977).

B. The Effect of the Right of Access on State Statutes

If the first amendment right of access was extended to delinquency proceedings, juveniles, as a class, would no longer be shielded from public exposure in proceedings conducted in juvenile courts.[219] The state legislatures would have to address this development and, at the least, revise their current statutes. Presently there are a variety of statutory schemes designed to protect confidentiality. Some states have left the decision on whether to close juvenile hearings to the discretion of the juvenile court judge.[220] Others provide that the general public is presumptively excluded from juvenile proceedings, but those with a direct interest in the case or in the work of the court[221] may attend at the discretion of the juvenile court judge.[222] Section 24(b) of the Uniform Juvenile Court Act contains similar language, however the commentary to this section indicates a conditional access scheme.[223] Under conditional access those permitted by the court to attend the juvenile proceedings may not reveal the identity of the juvenile offenders.[224] This practice has been adopted in several states.[225] Other states permit unconditional access to juvenile

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[219]In more than half the states this means juvenile trials could be televised. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 616 (Burger, C.J., dissenting).

[220]Fifteen states have adopted this approach either by statute or court rule. These states include: ALASKA STAT. § 47.10.070 (1975); ARIZ. R. PROC. JUV. CT. 19; ARK. STAT. ANN. § 45-442 (1977); COLO. REV. STAT. § 19-1-107(2) (1973); FLA. STAT. ANN. § 39.09(1)(c) (West Supp. 1983); IND. CODE § 31-6-7-10 (1982); IOWA CODE ANN. § 232.39 (West Supp. 1983-1984); KAN. STAT. ANN. § 38-822 (1981); MD. CTS. & JUD. PRAC. CODE ANN.§ 3-812(e) (1980); MO. ANN. STAT. § 211.171.5 (Vernon 1983); MO. R. PRAC. & PROC. JUV. CT. 117.02; N.C. GEN. STAT. § 7A-629, 640 (1981); OHIO REV. CODE ANN. § 2151.35 (Page Supp. 1982); TENN. CODE ANN. § 37-225(d) (1977); TEX. FAM. CODE ANN. § 54.08 (Vernon 1975).

[221]It is interesting to note that the language of the rape shield statute held unconstitutional in *Globe Newspaper* is almost identical to the language used in these juvenile shield statutes. *Compare* MASS. GEN. LAW ANN. ch. 278, § 16A (West 1969) *with* IDAHO CODE § 16-1608(b) (Supp. 1983).

[222]Sixteen states have adopted this approach either by statute or court rule. These states include: CONN. GEN. STAT. ANN. § 46b-122 (West Supp. 1983-1984); DEL. FAM. CT. R. 200(b)(2); HAWAII REV. STAT. § 571-41 (Supp. 1982); IDAHO CODE § 16-1608(b), 1813 (Supp. 1983); KY. REV. STAT. ANN. § 208.060(1) (Bobbs-Merrill 1982); LA. CODE JUV. PROC. ANN. art. 69 (West 1984); MASS. GEN. LAWS ANN. ch. 199, § 65 (West 1969); MICH. COMP. LAWS ANN. § 712A.17(1) (West Supp. 1983-1984); MISS. CODE ANN. § 43-21-203(6) (1981); NEV. REV. STAT. § 62.193(1) (1983); OKLA. STAT. ANN. tit. 10, § 1111 (West Supp. 1983-1984); R.I. GEN. LAWS § 14-1-30 (1981); S.C. CODE ANN. § 14-21-610 (Law. Co-op. 1976); VA. CODE § 16.1-302 (Supp. 1983); WASH. REV. CODE ANN. § 13.34.110 (Supp. 1983-1984); W. VA. CODE § 49-51(d) (Supp. 1983).

[223]UNIF. JUV. CT. ACT § 24(d), 9A U.L.A. 32-33 commissioners' note (Master ed. 1979).

[224]*See* I.J.A./A.B.A. JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO ADJUDICATION, Standards 6.1-6.3, at 70-76 (1980).

[225]Fifteen jurisdictions have adopted this approach either by statute, court rule or judicial interpretation. These include: ALA. CODE § 12-15-65 (1975); Brian W. v. Superior Court, 20 Cal.3d 618, 574 P.2d 788, 143 Cal. Rptr. 717 (1978) (intent of the

cases involving crimes which, if charged against adults, would be felonies.[226] In two states, all juvenile court proceedings are closed to the press and the public.[227]

The recognition of a right of access to juvenile proceedings will have an effect on all of these statutory schemes. The right of access would require that all juvenile proceedings be presumptively open and that any interference with this right meet the standards of strict scrutiny. The mandatory closure rule in the juvenile courts of New Hampshire and Vermont will probably be unable to meet the requirements of strict scrutiny. These statutes are not narrowly tailored to serve the needs of rehabilitation because a case-by-case approach would be just as effective and less restrictive. Moreover, these statutes fail to recognize that juvenile proceedings are presumptively open.

The states which presently allow access only to hearings involving specified offenses, i.e., felonies, will have to show that denying access to hearings on less serious offenses is founded on empirical evidence that demonstrates that confidentiality for certain classes of offenses promotes the rehabilitation of persons within that class. Those jurisdictions which have adopted the Uniform Act's conditional access approach might have to revise their practices even if a right of access to juvenile proceedings is not recognized, because such practices might be unconstitutional under the doctrines of *Smith v. Daily Mail Publishing Co.* and *Oklahoma Publishing Co. v. District Court.*[228]

The practice of excluding the general public, but admitting, at the juvenile court judge's discretion, those with a direct interest in the case or in the work of the court will probably be constitutionally infirm as not narrowly tailored to serve the interests of confidentiality since those properly admitted cannot be prevented from publicizing the events of the proceedings. The states that currently employ this scheme might have to adopt either a scheme of unconditional

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legislature in vesting juvenile court judge with discretion to admit those with a direct interest in the case was to allow press attendance); CAL. WELF. & INST. CODE § 346 (West Supp. 1984); D.C. CODE ANN. § 16-2316(e) (1981); GA. CODE ANN. § 15-11-28(c) (1982); ILL. ANN. STAT. ch. 37, § 701-20(6) (Smith-Hurd Supp. 1983-1984); MINN. STAT. ANN. § 260.155(1) (West 1982); N.J. JUV. & DOM. REL. CT. R. 5:9-1(a); N.M. STAT. ANN. § 32-1-31(B) (1981); N.Y. FAM. CT. ACT § 741(b) (McKinney 1983); N.Y. FAM. CT. R. 2501.2(a)(3), (c); N.D. CENT. CODE § 27-20-24(5) (Supp. 1983); OR. REV. STAT. § 419.498(1) (1983); 42 PA. CONS. STAT. ANN. § 6336(d) (Purdon 1982); S.D. CODIFIED LAWS ANN. § 26-8-32 (1976); WIS. STAT. ANN. § 48.299 (West Supp. 1983-1984); WYO. STAT. § 14-6-224(b) (1977).

[226]Three states have adopted this approach by statute. These states include: ME. REV. STAT. ANN. tit. 15, § 3307(2) (Supp. 1983-1984); MONT. CODE ANN. § 41-5-521(5) (1983); UTAH CODE ANN. § 78-3a-33 (1977).

[227]Two states have adopted this approach either by statute or judicial interpretation. These states are: N.H. REV. STAT. § 169-C:14 (Supp. 1983); *In re* J.S., 140 Vt. 458, 438 A.2d 1125 (1981); VT. STAT. ANN. tit. 33, § 651(c) (1981).

[228]*See generally*, Comment, *supra* note 8, at 140-48.

access to juvenile proceedings or a scheme that leaves the decision on closure to the juvenile court judge's discretion.

Finally, the statutes or court rules in those jurisdictions that already employ a discretionary scheme would probably be constitutional if a right of access to juvenile hearings was recognized. However, before a juvenile court judge could close a proceeding by exercising his discretion, he would first have to hold a hearing and provide those who object to the order an opportunity to be heard. The juvenile judge would also be required to make findings that show that closure was necessitated by a compelling state interest and that the closure was narrowly tailored to serve those interests.

V. CONCLUSION

The first amendment right of access developed from the conflict between freedom of the press and a defendant's right to a fair trial. A constitutional right of access has been recognized, but limited, thus far, to criminal trials and voir dire proceedings which have historically been open to the public. Juvenile proceedings, by contrast, have not historically been open. Nevertheless, the principal policy arguments in favor of access to adult trials apply with substantial force to juvenile proceedings. Open courtroom proceedings in both adult and juvenile cases have a value to society as a whole. Open proceedings strengthen public confidence in the courts, increase public respect for the law, permit the public to obtain information about institutions it must support financially, and help prevent miscarriages of justice. Therefore, juvenile delinquency proceedings represent one area that the right of access may be extended to include.

Although juvenile proceedings have traditionally been confidential to ensure that publicity would not interfere with the court's efforts to rehabilitate juvenile offenders, thus far, juvenile courts have not been successful in obtaining this goal of rehabilitation. The juvenile system has also failed to achieve the equally important goal of preventing juvenile crime. Because of the dramatic increase in juvenile crime and the lack of success of efforts to rehabilitate, the modern juvenile court currently operates much like an adult criminal court with an emphasis on punishment and deterrence. The Supreme Court has recognized the reality of this situation and has generally treated juvenile proceedings and criminal trials alike in the context of due process rights of the accused. Because of the system's failure to achieve its dual goals, the Court may decide that there is no principled basis for treating juvenile proceedings differently than criminal trials for purposes of the public's right of access.

If the right of access were extended to juvenile proceedings, such proceedings would be presumptively open and any attempt to close

a juvenile hearing would have to meet the rigid requirements of strict scrutiny; therefore, a state's interest in maintaining privacy for rehabilitative purposes might not always be sufficient to justify a denial of the public's first amendment right. Another consequence of such an extension of the right of access would be that the state legislatures would have to redraft their current statutes. The right of access would require the adoption of either a discretionary approach or a scheme of unconditional access. Before any juvenile proceeding could be closed, the juvenile court judge would have to hold a hearing, provide the public and the press an opportunity to state their objections, and make findings that support the closure order under the standards of strict scrutiny.

HARRY TODD

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